C. HABEAS CORPUS

November 2, 2012 Joel's Habeus Corpus was filed in Federal Court.

Read it:

PETITION FOR WRIT OF HABEAS CORPUS AND BRIEF IN SUPPORT- filed November 2, 2012 in Federal Court.

June 13, 2013....Read Joel's attorney's response to the Attorney General.

REPLY TO RESPONDENT'S ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS

1. PETITION forWRIT of HABEAS CORPUS and BRIEF in SUPPORT (11-2-12)

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

JOEL NATHAN DUFRESNE,

Petitioner,

-v.- Civil Action No.

CARMEN PALMER, Warden, HON.

Respondent.

_____/

F. MARTIN TIEBER (P25485)

Attorney for Petitioner

_____/

PETITION FOR WRIT OF HABEAS CORPUS

PURSUANT TO 28 U.S.C. § 2254

Petitioner Joel Nathan Dufresne was convicted in Emmet County, Michigan, after jury trial before the Honorable Charles W. Johnson, of three

counts of first degree criminal sexual conduct (Mich. Comp. Laws 750.520b(1)(f), using force or causing injury) and six counts of third degree

criminal sexual conduct (Mich. Comp. Laws 750.520d(1)(f), using force or coercion). Petitioner Dufresne's trial took place between August 16, 2006

and August 18, 2006. Mr. Dufresne was sentenced to 50-75 years in prison on the CSC 1 counts, and 25-50 years on the CSC 3 counts, by Judge

Johnson on September 22, 2006.

Petitioner Dufresne (Prisoner No. 257173) is currently unconstitutionally imprisoned by the Respondent Carmen Palmer, Warden, at the

Michigan Reformatory, in Ionia, Michigan (Ionia County).

2

This case was a credibility contest. A substantial number of witnesses, many of whom were on a defense witness list filed prior to trial, could

have testified in favor of Mr. Dufresene's position that Angela W-------- made up the claims of forced and non-consensual sex in order to obtain

custody of their son, abetted by law enforcement personnel with a severe dislike of Mr. Dufresne and a white supremacy group he was involved with.

However, trial defense counsel failed to investigate and presented NO witnesses save Mr. Dufresne, who was woefully unprepared to take the stand.

The result was a free pass for the complainant and death in prison for Mr. Dufresne. Direct appeal counsel's failure to unearth these federal

constitutional issues constitutes another investigatory failure in violation of the federal constitution.

On direct appeal in the Michigan state courts, represented by appointed counsel Michael B. Skinner (P62564), Petitioner filed a Brief on Appeal

and Motion to Remand for a Ginther hearing in the Michigan Court of Appeals on April 30, 2007 raising the following three issues:

1. It was reversible error for two police witnesses to testify that Mr. Dufresne asked to speak to a lawyer during his interrogation– that he had

"lawyered up" in the words of one of the officers– in violation of Mr. Dufresne's federal and state constitutional rights.

2. The trial court erred in admitting, the prosecution admitted misconduct by asking about, and counsel was ineffective for failing to object to

prejudicial testimony regarding Mr. Dufresne's character– that he had ties to a white supremacist group that was involved with the murder of a

judge's family in Chicago, and that he was scary and intimidating.

3. Trooper Armstrong impermissibly testified regarding the credibility of the complainant's allegations, prejudicing the defense by vouching

for the veracity of the complainant, depriving Defendant of his due process right to a fair trial, and trial counsel was ineffective for failing to object to

the testimony.

After original appointed direct appeal counsel Skinner experienced health difficulties, he was replaced by appointed counsel Patrick K. Ehlmann

(P31644). A Ginther hearing on some claims of ineffective assistance of counsel at trial was conducted in the state trial court on October 25, 2007.

On June 23, 2008, Petitioner filed a Supplemental Brief on Appeal raising the following two issues:

1. Did the trial court abuse its discretion by denying Defendant's motion for new trial based on his claim of ineffective assistance of counsel

due to his attorney's failure to object to the admission of evidence that Defendant was involved in a white supremacist group involved in the murder

of the family of a federal judge?

2. Did the trial court abuse its discretion by denying Defendant's motion for new trial based on his claim of ineffective assistance of counsel

due to his attorney's failure to object to the admission of testimony by Trooper Armstrong regarding the credibility of the complainant's allegations?

Petitioner's conviction and sentence were affirmed by the Michigan Court of Appeals, in a three-page unpublished per curiam opinion issued on

October 14, 2008. People v. Dufresne, Docket No. 273407, 2008 WL 5055959 (Mich. Ct. App., October 14, 2008). On December 8, 2008, Petitioner

filed a timely application for leave to appeal in the Michigan Supreme Court, which was denied on April 28, 2009. People v. Dufresne, 764 N.W.2d

266 (Mich. 2009). A timely motion for reconsideration in the Michigan Supreme Court was filed on May 15, 2009, and denied on August 6, 2009.

People v. Dufresne, 764 N.W.2d 266 (Mich. 2009).

On October 1, 2010, Petitioner, through present counsel, filed a motion for relief from judgment under Mich. Ct. Rule 6.500. That motion was

the first such motion filed by Petitioner Dufresne. See Mich. Ct. Rule 6.502(G). In that motion Petitioner raised the following three issues:

1. Trial defense counsel, with no strategic purpose, failed to interview and present witnesses, and failed to investigate and present facts, all of

which would have supported Petitioner's claim that the sexual conduct for which he has been sentenced to 50-75 years in prison was consensual,

and that the unsupported and uncorroborated claims of complainant were lacking in credibility. As a result of these and other failures, including

failure to investigate and present at trial critical impeaching material contained in taped interviews of Petitioner and complainant, Petitioner

Dufresne was denied the effective assistance of counsel guaranteed by the federal and state constitutions.

2. Petitioner was denied his federal and state due process right to present a defense, and his state and federal constitutional rights to

confrontation, when witness intimidation, and rulings of the trial court, along with ineffective assistance of trial counsel, prohibited exploration of

areas critical to factual support of his defense that the charges in this case resulted from false allegations.

3. Petitioner Dufresne was denied the effective assistance of counsel guaranteed by the federal and state constitutions where his appellate

counsel, on direct appeal, neglected "dead bang winners."

The trial court denied relief in an opinion dated July 15, 2011 (Exhibit F).

On August 4, 2011, Petitioner filed a timely application for leave to appeal in the Michigan Court of Appeals, which was denied in a short order

on December 27, 2011 "for failure to meet the burden of establishing entitlement to relief under MCR 6.508(D)." People v. Dufresne, (Mich. Ct. App.,

December 27, 2011, Docket No. 305490, unpublished order). A timely application for leave to appeal was filed by Petitioner in the Michigan

Supreme Court on February 17, 2012, and was denied on October 22, 2012. People v. Dufresne, ___ N.W.2d ___; 2012 WL 5232245 (Mich. 2012).

This Petitioner has exhausted the issues raised here.

Petitioner Dufresne did not file a petition for writ of certiorari in the United States Supreme Court after direct review or after state

postconviction litigation.

Other than the appeals to the trial court, Michigan Court of Appeals, and the Michigan Supreme Court outlined above, and the present Petition

for Writ of Habeas Corpus, no other petitions, applications or motions have been filed with respect to this judgment in any state or federal court.

In this case, Petitioner asserts that his trial defense counsel, with no strategic purpose, failed to interview and present witnesses who could have

supported Petitioner's claim that the sexual conduct for which he has been sentenced to 50-75 years in prison was consensual, and that the

unsupported and uncorroborated claims of complainant were lacking in credibility. Petitioner's defense counsel also failed to investigate and

present facts which would have made a difference at trial. As a result of these and other failures, including failure to investigate and present at trial

critical impeaching material contained in taped interviews of petitioner and complainant, Petitioner Dufresne was denied the effective assistance of

counsel guaranteed by the federal constitution.

Secondly, Petitioner will show that he was denied his federal due process right to present a defense, and his federal constitutional right to

confrontation when witness intimidation, and rulings of the trial court, along with ineffective assistance of trial counsel, prohibited exploration of

areas critical to factual support of his defense that the charges in this case resulted from a false allegation.

Third, Petitioner was denied the effective assistance of counsel guaranteed by the federal constitution where his appellate counsel, on direct

appeal, neglected "dead bang winners."

Fourth, Petitioner asserts that the state appellate court unreasonably applied clear United States Supreme Court precedent when it absolved

the state from the consequences of repeated violations of Doyle v. Ohio, 426 U.S. 610 (1976) after two police witnesses testified that Petitioner asked

to speak to a lawyer during his interrogation– that he had "lawyered up" in the words of one of the officers.

Fifth, Petitioner will also show that the state appellate court unreasonably applied clear United States Supreme Court precedent regarding due

process denial through severe prosecutorial misconduct, and unreasonably determined the facts, where the prosecution repeatedly assailed

Petitioner's character by asserting he had ties to a white supremacist group and by raising a false claim that Petitioner and this group was involved

with the murder of a judge's family in Chicago.

As noted above, Petitioner Dufresne's continued confinement is unconstitutional in several respects. As described in detail in the Brief in

Support, as to each of the asserted legal grounds for relief, Petitioner satisfies the standard of review set forth in 28 U.S.C. § 2254(d). In addition, as

to each and every asserted ground for relief, the identified error was not harmless under the governing legal standard.

Petitioner Dufresne has not filed any previous Petition for Writ of Habeas Corpus in this or any other federal district court. Petitioner has no

future sentences to serve after completion of the sentences imposed by the judgment under attack.

RELIEF REQUESTED

WHEREFORE, Petitioner Joel Nathan Dufresne requests that Respondent be required to appear and answer the allegations of this Petition, that

after full consideration, this Court relieve Petitioner Dufresene of the unconstitutional restraint on his liberty, and that this Court grant such other,

further and different relief as the Court may deem just and proper under the circumstances, as well as grant oral argument and an evidentiary

hearing (see Issues I and II) in this matter.

Respectfully Submitted,

BY: s/ F. MARTIN TIEBER (P25485)

Tieber Law Office

215 S. Washington Square

Suite C

Lansing, MI 48933

Dated: November 2, 2012

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

JOEL NATHAN DUFRESNE,

Petitioner,

-v.- Civil Action No.

CARMEN PALMER, Warden, HON.

Respondent.

_____/

F. MARTIN TIEBER (P25485)

Attorney for Petitioner

_____/

BRIEF IN SUPPORT OF

PETITION FOR WRIT OF HABEAS CORPUS

BY: F. MARTIN TIEBER (P25485)

Tieber Law Office

215 S. Washington Square

Suite C

Lansing, MI 48933

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

ii i

CONSTITUTIONS, STATUES, COURT RULES,

& RULES OF EVIDENCE

STATEMENT OF THE CASE

Petitioner Joel Nathan Dufresne was tried on sexual assault charges before a Michigan jury in Emmet County Circuit Court, the Honorable

Charles W. Johnson presiding, from August 16, 2006 through August 18, 2006. Mr. Dufresne was found not guilty of three counts of first degree

criminal sexual conduct, though he was convicted of three counts of first degree criminal sexual conduct (Mich. Comp. Laws § 750.520b(1)(f), using

force or causing injury) and six counts of third degree criminal sexual conduct (Mich. Comp. Laws § 750.520d(1)(f), using force or coercion). Mr.

Dufresne was sentenced to 50-75 years in prison on the three CSC 1 counts, and 25-50 years on the CSC 3 counts, by Judge Johnson on September

22, 2006.

On direct appeal, Petitioner's conviction and sentence were affirmed by the Michigan Court of Appeals, in a three-page unpublished per curiam

opinion issued on October 14, 2008. People v. Dufresne, Docket No. 273407; 2008 WL 5055959 (Mich. Ct. App., October 14, 2008). On December

8, 2008, Petitioner filed a timely application for leave to appeal in the Michigan Supreme Court, which was denied on April 28, 2009. People v.

Dufresne, 764 N.W.2d 266 (Mich. 2009). A timely motion for reconsideration in the Michigan Supreme Court was filed on May 15, 2009, and denied

on August 6, 2009. People v. Dufresne, 764 N.W.2d 266 (Mich. 2009).

On October 1, 2010, Petitioner, through present counsel, filed a motion for relief from judgment under Mich. Ct. Rule 6.500. That motion was

the first such motion filed by Petitioner Dufresne. See Mich. Ct. Rule 6.502(G). The trial court denied relief in an opinion dated July 15, 2011

(attached as Exhibit F). Petitioner appealed to the Michigan Court of Appeals and, on December 27, 2011, that court denied leave to appeal in a

standard order "for failure to meet the burden of establishing entitlement to relief under MCR 6.508(D)." People v. Dufresne, (Mich. Ct. App.,

December 27, 2011, Docket No. 305490, unpublished order). The Michigan Supreme Court also denied a timely application for leave to appeal on

October 22, 2012. People v. Dufresne, ___ N.W.2d ___; 2012 WL 5232245 (Mich. 2012).

Other than the appeals to the Michigan Court of Appeals and the Michigan Supreme Court outlined above, and the present Petition for Writ of

Habeas Corpus, no other petitions, applications, or motions have been filed with respect to this judgment in any state or federal court.

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER TRIAL DEFENSE COUNSEL, WITH NO STRATEGIC PURPOSE, FAILED TO INTERVIEW AND PRESENT WITNESSES, AND FAILED TO INVESTIGATE AND PRESENT FACTS, ALL OF WHICH WOULD HAVE SUPPORTED PETITIONER'S CLAIM THAT THE SEXUAL CONDUCT FOR WHICH HE HAS BEEN SENTENCED TO 50-75 YEARS IN PRISON WAS CONSENSUAL, AND THAT THE UNSUPPORTED AND UNCORROBORATED CLAIMS OF COMPLAINANT WERE LACKING IN CREDIBILITY. AS A RESULT OF THESE AND OTHER FAILURES, INCLUDING FAILURE TO INVESTIGATE AND PRESENT AT TRIAL CRITICAL IMPEACHING MATERIAL CONTAINED IN TAPED INTERVIEWS OF PETITIONER AND COMPLAINANT, AND FAILURE TO OBJECT TO INADMISSIBLE AND PREJUDICIAL EVIDENCE AGAINST PETITIONER, PETITIONER DUFRESNE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FEDERAL CONSTITUTION (U.S. CONST. AMEND. VI).

II. WHETHER PETITIONER WAS DENIED HIS FEDERAL DUE PROCESS RIGHT TO PRESENT A DEFENSE, AND HIS FEDERAL CONSTITUTIONAL RIGHT TO CONFRONTATION (U.S. CONST., AMS. V, VI & XIV), WHEN WITNESS INTIMIDATION, AND RULINGS OF THE TRIAL COURT, ALONG WITH INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL (ISSUE I, SUPRA), PROHIBITED EXPLORATION OF AREAS CRITICAL TO FACTUAL SUPPORT OF HIS DEFENSE THAT THE CHARGES IN THIS CASE RESULTED FROM A FALSE ALLEGATION.

III. WHETHER PETITIONER DUFRESNE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FEDERAL CONSTITUTION (U.S. CONST. AMEND. VI) WHERE HIS APPELLATE COUNSEL, ON DIRECT APPEAL, NEGLECTED "DEAD BANG WINNERS."

IV. WHETHER THE MICHIGAN COURT OF APPEALS UNREASONABLY APPLIED DOYLE V. OHIO, AND ISSUED AN OPINION THAT WAS CONTRARY TO DOYLE, WHEN IT CITED A STATE CASE FOR THE PROPOSITION THAT FAILURE TO 'IMPUGN THE REQUEST FOR COUNSEL' OR 'CREATE ANY INFERENCE FROM THE INVOCATION OF THE RIGHT TO COUNSEL' ABSOLVED THE STATE FROM CONSEQUENCES OF REPEATED DOYLE ERROR.

V. WHETHER THE MICHIGAN COURT OF APPEALS, ON DIRECT REVIEW, UNREASONABLY APPLIED CLEAR UNITED STATES SUPREME COURT PRECEDENT, AND UNREASONABLY DETERMINED THE FACTS, WHEN IT RULED THAT PETITIONER'S DUE PROCESS RIGHT TO

A FAIR TRIAL (U.S. CONST. AMENDS. V, XIV) WAS NOT VIOLATED WHEN THE PROSECUTOR ENGAGED IN SEVERE AND REPEATED OUTCOME-DETERMINATIVE MISCONDUCT BY ASKING ABOUT PETITIONER'S CHARACTER– THAT HE HAD TIES TO A WHITE SUPREMACIST GROUP THAT WAS INVOLVED WITH THE MURDER OF A JUDGE'S FAMILY IN CHICAGO (A FALSE AND HIGHLY PREJUDICIAL CLAIM).

SUMMARY OF THE ARGUMENT

The decision of the Michigan Court of Appeals and the state trial court (as to issues run for the first time on state postconviction collateral

attack), on significant federal constitutional issues, constitute an unreasonable application of clear United States Supreme Court precedent, are in

part contrary to clear United States Supreme Court precedent, and at some points contain unreasonable fact determinations under 28 U.S.C. §

2254(d)(2).

Petitioner Joel Dufresne and Complainant Angela W-------- had a tempestuous relationship. Both Joel and Angela had serious problems when

they met, decided to live together, and had a child. Angela was beset by substance abuse (drugs and alcohol) and psychiatric problems. She had

substantial issues with theft and dishonesty. She seriously injured another person in an alcohol fueled driving incident, and fled from the area during

an incident in which her brother died because she was drinking and was on probation. She was assaultive toward others, and had accused another

father of one of her children of assault in the past. She was known to be sexually adventurous and experimental, despite testifying at trial that

unusual sexual acts were abhorrent to her.

Very little of this information, however, was in the hands of the jury that convicted Petitioner Dufresne of an offense which resulted in a

sentence of death in prison (50-75 years). The jury was deprived of this information because the state trial court granted an omnibus prosecution

motion in limine, because trial defense counsel failed to properly investigate the case, and as a result of witness intimidation.

Mr. Dufresne had been looked at by the Michigan State Police in conjunction with the death of the family of an Illinois federal district court judge

nearly a year before the allegations in this case surfaced. Despite the fact that it immediately became clear that the judge's family was killed by

someone with a grudge about a case decision, someone who had nothing to do with Mr. Dufresne or any group he belonged to, he was kept under

review by the Michigan State Police (MSP). At some point in early 2006, Mr. Dufresne's repeated trips to Florida to visit family with the son he had

with the complainant, caused the complainant to seek assistance with getting her son back from her probation officer. She was put in touch with the

state police detective already monitoring Mr. Dufresne. When it became clear that there were no offenses being committed, the allegations of

unwanted and forced sex arose.

This case was a very triable credibility contest. A substantial number of witnesses, some of whom were on a defense witness list filed prior to

trial, could have testified in favor of Mr. Dufresne's position that Angela W-------- made up the claims of forced and non-consensual sex in order to

obtain custody of their son, abetted by law enforcement personnel with a severe dislike of Mr. Dufresne and a white supremacy group he was

involved with. However, trial defense counsel failed to investigate and presented NO witnesses save Mr. Dufresne, who was woefully unprepared to

take the stand. Trial defense counsel also failed to investigate and present to the jury a series of critical and pertinent inconsistent statements by the

complainant with respect to the factual claims she made in relation to the allegations of forced sex. The result was a free pass for the complainant and

death in prison for Mr. Dufresne. Direct appeal counsel's failure to unearth these substantial federal constitutional issues constitutes another

investigatory failure in violation of the federal constitution, and provides cause to overcome the procedural default due to failure to raise these

matters on direct appeal.

In addition to the issues summarized above, which were run on state postconviction collateral attack, Petitioner asserts he is incarcerated in

violation of the federal constitution because the state prosecutor was permitted, over objection, to repeatedly tell the jury that Petitioner exercised

his right to counsel after receiving Miranda warnings, and because the prosecutor committed misconduct by introducing irrelevant and highly

prejudicial character evidence concerning Petitioner's ties to a white supremacist organization, and because the prosecutor elicited a false claim that

Petitioner was linked to the murder of the family of a federal judge in Chicago. These issues, including an argument that trial defense counsel was

ineffective under Strickland for failure to object to the prejudicial character evidence, were run on direct appeal.

STATEMENT OF FACTS

After Joel Nathan Dufresne was charged with multiple counts, a jury trial took place in Emmet County, Michigan, Circuit Court before the

Honorable Charles W. Johnson from August 16, 2006 through August 18, 2006. Mr. Dufresne was found not guilty of three counts of first degree

criminal sexual conduct, though he was convicted of three counts of first degree criminal sexual conduct (Mich. Comp. Laws § 750.520b(1)(f), using

force or causing injury) and six counts of third degree criminal sexual conduct (Mich. Comp. Laws § 750.520d(1)(f), using force or coercion). Mr.

Dufresne was sentenced to 50-75 years in prison on the CSC 1 counts, and 25-50 years on the CSC 3 counts, by Judge Johnson on September 22,

2006.

Direct appeal was taken to the Michigan Court of Appeals. Petitioner's convictions and sentences were affirmed by the Michigan Court of

Appeals, in a 3-page unpublished per curiam opinion issued on October 14, 2008. People v. Dufresne, Docket No. 273407, 2008 WL 5055959 (Mich.

Ct. App., October 14, 2008). On December 8, 2008, Petitioner filed a timely application for leave to appeal in the Michigan Supreme Court, which

was denied on April 28, 2009. People v. Dufresne, 764 N.W.2d 266 (Mich. 2009). A timely motion for reconsideration in the Michigan Supreme

Court was filed on May 15, 2009, and denied on August 6, 2009. People v. Dufresne, 769 N.W.2d 678 (Mich. 2009).1

---

1 Direct review ended 90 days after August 6, 2009, on November 4, 2009, when the period within which Mr. Dufresne could have petitioned for a writ of certiorari to the United States Supreme Court expired. See Clay v. United States, 537 U.S. 522 (2003); Bronaugh v. Ohio, 235 F.3d 280, 283 (6th Cir. 2000); Abela v. Martin, 348 F.3d 164 (6th Cir. 2003); Mr. Dufresne had one year from that date, or until November 4, 2010, within

which to file his federal habeas petition. The timely filing of a state postconviction action on 10/1/2010 froze the federal clock, with one month and four days remaining on it, until after state postconviction litigation concluded with the decision of the Michigan Supreme Court denying leave to appeal on October 22, 2012. This habeas corpus petition is timely.

A Motion for Relief from Judgment under Mich. Ct. Rule 6.500 was filed in the Emmet County Circuit Court on October 1, 2010. The trial court

entered an Opinion and Order on July 15, 2011, denying all relief, including an evidentiary hearing (attached as Exhibit F). The Michigan Court of

Appeals denied leave to appeal, on December 27, 2011, in a standard order "for failure to meet the burden of establishing entitlement to relief under

MCR 6.508(D)." People v. Dufresne, (Mich. Ct. App., December 27, 2011, Docket No. 305490, unpublished order). The Michigan Supreme Court also

denied a timely application for leave to appeal on October 22, 2012. People v. Dufresne, ___ N.W.2d ___; 2012 WL 5232245 (Mich. 2012).

A. <u>Initiation of Allegations</u>

Petitioner Joel Dufresne began dating complainant Angela W-------- in October-November of 2003 (T II 29). According to Angela she was

subjected to physical abuse as early as September of 2004 (T I 202; T II 29). She claimed her relationship with Joel "pretty much stayed violent"

after that point, especially after she had Hale (her child with Mr. Dufresne, born on December 2, 2004) (T I 206). Angela claimed that Joel treated

her "like crap" after they moved into a trailer in February-March, 2005 (T I 211).

Angela claimed she did not like digital or anal sex and Joel Dufresne was a "sick bastard" for doing this to her (T I 237-238). Joel "degraded" her

and "treated me like a toy, like a thing that he could do whatever he wanted sexually to, like his sickest most freakish desires that he could do to me"

(T I 195). Angela was not into doing a "threesome" and did not want to masturbate in front of a camera while Joel Dufresne was in Florida (T I 241-

242). She said that his request that she put things inside her was "disgusting" (T I 243). Sex talk she engaged for hours at Joel's instigation "disgusted

me all to hell" (T I 243). She did not want to have anal sex with Joel Dufresne (T II 8, 15). She did not like using a part of a toy as a dildo, and said this

was forced on her (T II 13).

Angela W--------'s claims of constant forced, non-consensual anal sex and constant forced insertion of objects and dildos into her anus, was not

corroborated medically, despite her suggestion to the contrary at exam (PET 28). Doctor Samuel Minor stated that he conducted a rectal exam of

Angela W-------- on March 2, 2006, and the visual and digital components of the exam revealed nothing out of the ordinary (T II 60). The anascopy,

with instruments, turned up a centimeter long linear healing abrasion of the rectal lining (Id.). His exam caused bleeding, which he felt was unusual

(T II 61). The injury was consistent with something inserted in the rectum (T II 61-62). Joel Dufresne admitted web cam use of a toy for insertion by

Angela, but claimed this activity, as well as frequent anal sex, was consensual on her part (T II 155, 165). A digital rectal exam of Angela W-------- on

January 16, 2006 at Minor's office was normal (T II 74-75). Such a finding would be inconsistent with assaultive activity (T II 75).

Angela stated she was beaten by Joel on several occasions, but each time she told medical and police personnel that someone else had hurt her

(T I 217; T II 34 – falsely claiming she was beaten by a pregnant girl; T I 234-235; T II 29-30 – falsely claiming she was beaten by her "ex" Leon

Cabruski [sic]). She admitted to attacking Mr. Dufresne with a plastic wooden spoon and a board during these episodes (T I 215, 230).2 During the

second episode, in Cadillac on June 25, 2005, Angela did not feel intoxicated

---

2 That the relationship was tempestuous was clear. On March 1, 2005 Petitioner Dufresne reported to police that Angela assaulted him in front of the Harbor Hall Outpatient Treatment Center in Petoskey. See report of Schultz, D.T., attached in Exhibit B.

(T I 231). A blood draw at 6:10 a.m. the morning after the fight, however, showed a BAC of .139, nearly twice the legal limit.

Joel Dufresne took his and Angela's son Hale to Florida (Joel's mother and his sisters lived in Florida), on two occasions, both before and after

Hale's first birthday, in November and December of 2005 (T I 237-240). The second trip was close to the holidays. When it appeared that Joel was

not coming back from Florida, where he had taken their son Hale, apparently after a third trip to Florida in February of 2006, Angela called her

probation officer, who in turn told her he would "call somebody and to come in and help me" (T I 248).

Angela was contacted by Michigan State Police detective Gwen White-Erickson. Angela told White-Erickson Joel "had took off with our son…and

that I didn't okay him to do that" (T I 249). Angela asked detective White-Erickson "how to get my son back" (T II 53). At some point Angela's father

was given the number of an attorney to contact (Id.). This led to a PPO drafted by the lawyer against Mr. Dufresne (T II 54-55).3 After Angela told the

detective that "I didn't know what to do about Hale," questioning surfaced the criminal sexual conduct charges that were brought against Mr.

Dufresne (T I 251).

At exam, Angela stated that detective White-Erickson initiated the discussion of possible violence in the relationship (PET 8, 42). At trial, White-

Erickson stated that when she first spoke to Angela on February 14, 2006, she asked "general" questions

---

3 At exam, Ms. W-------- testified she filled out forms with her lawyer to obtain custody of Hale, apparently through a PPO filed against Petitioner Dufresne, and probate court custody paperwork. When trial defense counsel tried to establish that this paperwork said nothing about any sexual assaults, the prosecution objected and the court sustained (PET 40-42).

---

about custody issues, and then Angela "started to just spill out" information regarding physical assaults and "several sexual things that had

happened to her since [the Cadillac incident, June 25, 2005]" (T II 97-98). On February 15, 2006, White-Erickson filed a police report titled:

POSSIBLE PARENTAL KIDNAPPING/DOMESTIC ASSAULT. Several pages of this six-page report are blanked out. On February 15, 2006, White-

Erickson met with Chief Assistant Prosecuting Attorney Eric Kaiser regarding parental kidnapping and "advised him of the birth certificate and gave

him a copy of the affidavit of parentage to review." Kaiser "advised no criminal charges could [sic] authorized regarding parental kidnapping" (see

MSP supp report 2/15/06, p. 5, attached in Exhibit B).

The next day, White-Erickson filed a report in which she "reopened" on "assault and battery/domestic violence." Much of this three-page report

is blanked out as well. A "detailed account" by Angela Wiertalla was attached. See MSP supp report 2/16/06, attached in Exhibit B.

Long before she contacted Angela in early 2006, Detective White-Erickson was aware of Joel Dufresne. In a police report dated March 4, 2005,

White-Erickson detailed her efforts in locating Joel Dufresne for the FBI in connection with the murder of the family of Illinois Federal District Court

Judge Joan Lefkow. (See MSP report, 3/4/05, attached in Exhibit B).4 Indeed, White-Erickson connected Joel Dufresne directly to the

---

4 Less than a week later, on March 10, 2005, police and the FBI were aware that the white supremacist organization to which Petitioner Dufresne belonged had nothing to do with the murder of Judge Lefkow's family. An electrician, Bart Ross, a plaintiff in a med-mal case that Judge Lefkow had dismissed, confessed to the murders prior to killing himself. Physical evidence clearly tied him to the crime. See http://en.wikipedia.org/wiki/Joan_Lefkow. Despite this, Detective White-Erickson continued to work with the FBI in relation to Petitioner Dufresne, through the end of
(continued on next page)

---

murder of the Judge's family in her testimony to the jury in this case (T II 106). In his five-page cross of White-Erickson, trial defense counsel failed

to correct this linkage, and failed to in any way tell the jury that it had been determined that Mr. Dufresne, and the creativity movement to which he

had been connected, had nothing to do with the death of the Judge's family (T II 116-120).

B. <u>Pretrial Limitation of Defense and Witness Intimidation</u>

A week prior to trial, on August 9, 2006, the prosecutor filed a motion in limine seeking to exclude the defense from "raising the following issues":

• Complainant's prior sexual conduct with Mr. Dufresne or anyone else.

• Allegations that complainant had accused others of criminal sexual conduct against her.

• Complainant's mental health or her psychological or psychiatric care, including self-inflicted injury.

• Prior record of Complainant.

• Prior drug use of complainant.

At the same time, the prosecutor filed a notice of intent to admit a multitude of uncharged alleged misconduct of Mr. Dufresne. The defense filed

a response to the motion in limine on August 11, 2006, and the state trial court heard and granted the prosecutor's motion in full on August 11,

2006:

The Court will grant the motion in limine as to the matters that are uncontested. The Court will likewise grant the motion as to the

contested items but with the understanding

_____

(continued from previous page)

2005, under the claim of "assist FBI hate crimes/intimidation." See supplemental police report of White-Erickson dated 12/2/05, attached in

Exhibit B.

_____

that a ruling in limine always is subject to being revisited at the time of trial. [HT 8/11/06 5].

The record does not reflect any attempt to revisit this ruling at trial. The prosecutor's original motion and the defense response, along with the

prosecutor's notice of intent to admit "evidence of other acts," are attached in Exhibit E.

On May 16, 2006, trial defense counsel filed a "witness and exhibit list" with approximately 20 entries under witnesses, and 9 entries listed

under exhibits. This list is also attached in Exhibit E. With the exception of Mr. Dufresne, no witnesses were called by the defense at trial.

C. <u>Trial Issues</u>

Petitioner Dufresne was tried in state court from August 16, 2006 through August 18, 2006. Trooper Armstrong testified that when he asked

Petitioner a specific question about one of the incidents, Petitioner responded: “Before I answer any specific questions, I want a lawyer” (T I 177).

Trooper Armstrong added that this was what the police derogatorily refer to as “lawyering up” (T I 177). The state trial court overruled defense

counsel’s objection to this testimony. Having established that the trial court would permit the testimony, the prosecution questioned Detective

White-Erickson about the interrogation, and she repeatedly stated that Petitioner requested a lawyer when questioned about a specific allegation (T

II 102).

During testimony of Detective White-Erickson, the prosecutor elicited the false (see above at fn. 4) claim that Petitioner Dufresne had been

investigated by the FBI in connection with the murder of a Chicago Judge’s family (T II 106).

In addition, the prosecutor elicited testimony from jail inmate Joseph Binganen that Petitioner Dufresne was very scary and intimidating (T II

91). Dufresne talked about his case with him and showed Mr. Binganen the name of a co-worker at McDonald’s in a police report (T II 92). Dufresne

wanted Mr. Binganen to have the co-worker contact his lawyer (T II 92). Mr. Binganen claimed he was scared and said yes (T II 93).

During his testimony, Trooper Armstrong testified that the police tried to do the best job they could in investigation and try to investigate it as

fully as possible and document things, and talk to people to substantiate the facts in the case if they can (T I 181). He said that were looking for

evidence that can go either way, and in different cases in the past accusations were made and after looking into them, you would come to find out

that it probably didn’t happen (T I 181). He continued on re-direct by testifying that when listening to the taped calls in the jail if he, hypothetically,

heard the Petitioner say that so and so had proof of his innocence, he would check it out (T I 192).

D. <u>Information Discovered in Postconviction Investigation</u>

During the summer of 2010, after completion of direct review, postconviction investigation was engaged by present counsel through licensed

investigator Julianne Cuneo. Her affidavit is attached in Exhibit A. Ms. Cuneo notes that several of the witnesses she spoke to, some of whom were

listed in the May, 2006 defense witness list, indicated concerns regarding coming forward with information that might have been beneficial to Mr.

Dufresne. These witnesses were approached by representatives of law enforcement and "warned off." Indeed, Ms. Cuneo herself was contacted by law

enforcement, and subjected to an interrogation that she felt was unusual. Finally, Loretta Perry, a former foster parent of Joel Dufresne who had

custody of him at a young age and who recently discovered he was in prison, was subjected to an intrusive interrogation by

law enforcement after it was discovered that she was assisting Mr. Dufresne with his current legal matters (affidavit of Loretta Sue Perry, attached in

Exhibit A).

Postconviction investigation by current counsel and licensed investigator Julianne Cuneo resulted in the discovery of pertinent documents and

witnesses, none of which were brought forward at trial:

• Pertinent Documents

1. In 2000, Angela W--------, then age 21, sought a PPO against another man who had fathered children with her, Leon Kerberskey, claiming that she

was beaten by him (PPO documents attached in Exhibit C). Kerberskey's sister told investigator Cuneo that Wiertalla was violent toward Kerberskey,

and indicated that Angela W-------- was entertaining a male friend of Kerberskey at the residence she shared with Kerberskey while Kerberskey was

at work (affidavit of investigator Cuneo, Exhibit A). Kerberskey was not located in postconviction investigation. He did tell police prior to trial that

Angela was psychotic, and that she was violent toward him when she got angry. He told police that others would support this claim. Kerberskey told

police that Angela had told him that she had been raped by a previous boyfriend (report of Trooper James Armstrong, March 27, 2006, attached in

Exhibit C).

2. A three page ICHAT report shows convictions of Angela W-------- for drunk driving, originally charged as a drug offense, OUIL causing serious

injury, and third degree retail fraud. Attached in Exhibit C.

3. A report dated 10/24/01 by Emmet County Sheriff's Department recounts yet another arrest for open intox and violation of restricted driver's

license. The officer narrative suggests that Angela was not truthful during the interrogation after the stop. Attached in Exhibit C.

4. An incident investigation report by the Emmet County Sheriff's Department, Officer Erickson, dated 5/2/05, describes a 4/13/05 theft by Angela.

The officer narrative indicates that Angela W-------- initially lied to the investigating officer who told her that her statement "did not make any

sense." Attached in Exhibit C.

5. Another Incident Report by the Emmet County Sheriff's Department, Officer Jenkins, notes an Obstructing Justice charge against Angela W--------.

This report is dated 6/3/05. Attached in Exhibit C.

- **Witnesses**

1. Jessica Maine Goode discussed Angela W--------'s theft from Glenn's Market and noted that Angela was sexually experimental and it showed in the

way she talked and acted. Affidavit of investigator Cuneo, Exhibit A.

2. Erin Wood (Pendergraph) was close to Angela W-------- through August of 2005, and was at her home often. She noted that Joel Dufresne and

Angela would argue, but she never observed any violence. Wood said that Angela was not afraid of Joel, and Angela was an assertive person who

knew how to stand up for herself. Angela never told Wood that Joel was brutal or abusive in any way. Wood and Angela often engaged in "girl talk,"

which included candid conversations about sex. Wood knew that Angela and Joel had an active sex life that included a lot of variety and

experimentation. Angela never told Wood she was forced to do any sex acts, and she seemed to be a willing partner in the various and experimental

sexual situations between her and Joel. Angela seemed

to enjoy the "wild and unusual" sex life with Joel Dufresne. Trial defense counsel never contacted her. Affidavit of Erin Meghan Wood, Exhibit A.5

3. Alechia Richeleau was never contacted by trial defense counsel. Richeleau stated that Angela W-------- came on to her sexually at one time.

Affidavit of investigator Cuneo, Exhibit A.

4. Brandie Degroff stated her mother, who witnessed the Harbor Hall fight between Joel Dufresne and Angela W--------, was threatened by police and

told to stay out of the case. Brandie perceived that as a threat against her as well. As a former girlfriend of Joel Dufresne she stated that he was not

violent toward her in any way. Brandie saw marks on Joel that she believes were inflicted by Angie. Brandie feared Angie due to information she had

that Angie was violent. Brandie never spoke to trial defense counsel. Affidavit of investigator Cuneo, Exhibit A.

5. Audra Farnsworth stated Joel might have hit Angie but only if she hit him first. Audra indicated that Joel is not violent in relationships, and she

knew this as Joel had a relationship with a friend of hers. Audra noted that Angie demonstrated ungrounded jealousy in relation to Joel. Affidavit of

investigator Cuneo, Exhibit A.

6. Mary Phillips is Leon Kerberskey's sister. Leon Kerberskey told her about violence demonstrated by Angie toward Kerberskey. Phillips lived near

Angie and Kerberskey. She said she knew that Angie was entertaining one of Kerberskey's male friends while living with Kerberskey while Kerberskey

was at work. Affidavit of investigator Cuneo, Exhibit A.

---

5 All original signed affidavits discussed herein were filed in the Emmet County, Michigan, Circuit Court during the course of state postconviction

litigation in that court.

---

7. Adam Paskle stated that Angela Wiertalla left the scene of her (Angela's) brother's death because she was on probation and had been drinking.

Affidavit of investigator Cuneo, Exhibit A.

8. Robert Poppel stated that he was good, close friends with Angela W-------- and Joel Dufresne for several years prior to Joel's arrest. He spent two

weekends per month living with them, and moved in permanently weeks before Joel Dufresne went to Florida. He indicated Joel and Angie would get

drunk and beat each other, but not viciously. He did not see any severe physical or sexual abuse in the household, and if it had happened he would

have known about it. He believes the charges against Joel are exaggerated, as Angie tends to exaggerate, and he has known her to do so on many

occasions. Angela was on "a lot of psych medications" and was getting "a lot of counseling the whole time I knew her." Angela did drugs, popped pills

and drank. He denies witnessing a major battle between Angela and Joel, and never tried to stop Joel from beating Angela. Angela was not forced to

write letters to prisoners. Joel did not hate Angela's oldest child. Poppel was told by the prosecutor and the "lady sheriff" that his testimony was not

needed, and that he should not be at the courthouse until sentencing. Joel's attorney never attempted to contact Poppel. Affidavit of Robert Poppel,

Exhibit A.

Additional facts will be noted as needed in the issue discussions.

STANDARD OF REVIEW

The standard of review for a habeas petition is set forth in 28 U.S.C. § 2254(d). That section provides that the writ may be granted if the state

appeal:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

This habeas petition is predicated upon these standards.

Review under § 2254(d)(1) focuses on what a state court knew and did. Cullen v. Pinholster, 131 S.Ct. 1388; 179 L.Ed.2d 557 (2011).

Disagreement with the state court's finding is insufficient, and this Court must determine that the state court's judgment was unreasonable to grant

the writ pursuant to § 2254(d)(2). Wood v. Allen, 558 U.S. 290 (2010).

28 U.S.C. § 2254(d)(2) presents an independent ground permitting the grant of the writ if the state court decision was based on an unreasonable

determination of the facts. See Williams v. Taylor, 529 U.S. 362, 386 (2000). See also Stewart v. Erwin, 503 F.3d 488, 500 (6th Cir. 2007). 28 U.S.C.

§ 2254(d)(2) should be read in conjunction with 28 U.S.C. § 2254(e)(1), which allows the presumption of correctness as to state court factual

determinations to be dislodged by clear and convincing evidence.

As used in the federal habeas statute, the phrase "clearly established federal law" refers to the holdings of the United States Supreme Court. See

Taylor v. Withrow, 288 F.3d 846, 850 (6th Cir. 2002). However, "clearly established law under the Act encompasses more than just bright-line rules

laid down by the [Supreme] Court." Id. It also includes "the legal principles and standards flowing from those rules." Ruimveld v.

Birkett, 404 F.3d 1006, 1010 (6th Cir. 2005). Accordingly, "the lack of an explicit statement of a particular rule by the Supreme Court is not

determinative." Id.

Habeas relief is warranted where a state court decision is either "contrary to" or "an unreasonable application of" clearly established federal

law. A decision is "contrary to" federal law in two situations: where the state court "applies a rule that contradicts the governing law set forth in"

Supreme Court decisions, Williams v. Taylor, supra, at 405-06 (2000), or where the state court "decided a case differently than the Supreme Court

has decided on a set of materially indistinguishable facts." Dorchy v. Jones, 398 F.3d 783, 787 (6th Cir. 2005).

The habeas statute also provides for the grant of relief where the state court decision is an "unreasonable application of" federal law. A state court

unreasonably applies federal law where it "correctly identifies the correct governing legal rule from [the Supreme Court's] cases but unreasonably

applies it to the facts of the particular state prisoner's case." Ruimveld, supra at 1010. This provision does not require that the Supreme Court must

have previously decided the very case that a lower court has before it. Rather, an unreasonable application occurs where "the state court either

unreasonably extends a legal principle from [the Supreme Court's] precedent to a new context where it should not apply or unreasonably refuses to

extend that principle to a new context where it should apply." Id.

Finally, where a state court does not assess the merits of a constitutional claim that was presented to it, the deference due under AEDPA "does

not apply." Cone v. Bell, 556 U.S. 449, 472 (2009); Brooks v. Bagley, 513 F.3d 618 (6th Cir. 2008); Maples v. Steagall, 340 F.3d 433, 437 (6th Cir.

2003). This Court should review such claims de novo. Matthews v. Ishee, 486 F.3d 883, 891-892 (6th Cir. 2007); Lyell v. Renico, 470 F.3d 1177,

1181-1182 (6th Cir. 2006).

In the case at bar, the state trial court opinion on postconviction (Exhibit F), and the opinion of the Michigan Court of Appeals on direct review,

were the last state court opinions to provide any significant analysis on the issues raised herein. Because these opinions contained the last reasoned

analysis on the pertinent issues, the habeas court must "look through" to those opinions to determine if the state court analyses, assuming the state

courts did adjudicate federal constitutional issues presented to them, were "contrary to" or involved an unreasonable application of U.S. Supreme

Court precedent. Greene v. Fisher, 132 S.Ct. 38, 45; 181 L.Ed.2d 336 (2011); Joseph v. Coyle, 469 F.3d 441 (6th Cir.2006) (citations omitted); see

also, Ylst v. Nunnemaker, 501 U.S. 797, 803-804 (1991) and Guilmette v. Howes, 624 F.3d 286, 291 (6th Cir. 2010) (en banc).

ARGUMENTS

I. TRIAL DEFENSE COUNSEL, WITH NO STRATEGIC PURPOSE, FAILED TO INTERVIEW AND PRESENT WITNESSES, AND FAILED TO INVESTIGATE AND PRESENT FACTS, ALL OF WHICH WOULD HAVE SUPPORTED PETITIONER'S CLAIM THAT THE SEXUAL CONDUCT FOR WHICH HE HAS BEEN SENTENCED TO 50-75 YEARS IN PRISON WAS CONSENSUAL, AND THAT THE UNSUPPORTED AND UNCORROBORATED CLAIMS OF COMPLAINANT WERE LACKING IN CREDIBILITY. AS A RESULT OF THESE AND OTHER FAILURES, INCLUDING FAILURE TO INVESTIGATE AND PRESENT AT TRIAL CRITICAL IMPEACHING MATERIAL CONTAINED IN TAPED INTERVIEWS OF PETITIONER AND COMPLAINANT, AND FAILURE TO OBJECT TO INADMISSIBLE AND PREJUDICIAL EVIDENCE AGAINST PETITIONER, PETITIONER DUFRESNE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FEDERAL CONSTITUTION (U.S. CONST. AMEND. VI).

In Perry v. New Hampshire, 132 S.Ct. 716, 718; 181 L.Ed.2d 694 (2012) the United States Supreme Court stated that the Constitution protects a

criminal defendant against unreliable evidence, not by suppressing it, but by "affording the defendant means to persuade the jury that the evidence

should be discounted as unworthy of credit." The primary mechanism for carrying out this essential persuasion is cross-examination and

confrontation. When trial defense counsel fails to investigate, this mechanism is unavailable. See also Martinez v. Ryan, 132 S.Ct. 73, 180 L.Ed.2d

938 (2012), where a seven-justice majority held that the right to effective trial counsel is a "bedrock principle in our justice system."

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court definitively laid out the tests, to be used by state and federal

courts in interpreting the federal constitutional guarantee of counsel under the Sixth Amendment, to determine whether a criminal defendant was

afforded due process when he or she claims that counsel was ineffective. In Strickland the Court noted that the "object of an ineffectiveness claim is

not to grade counsel's performance." Strickland, supra at 697. The Strickland standard for judging ineffective assistance of counsel has two

components, performance and prejudice:

"First, the Petitioner must show that counsel's performance was deficient …. Second, the Petitioner must show that the deficient performance

prejudiced the defense." Id. at 687.

As to performance, the basic question is "whether counsel's assistance was reasonable considering all the circumstances." Strickland, 466 U.S.

at 688. As to prejudice, the required showing is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of

the proceeding would have been different." Id. at 694. A "reasonable probability" is defined as "a probability sufficient to undermine confidence in

the outcome." Id. at 694. There is no need to prove prejudice by a preponderance of the evidence: "The result of a proceeding can be rendered

unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have

determined the outcome." Id. at 694. The Strickland Court stressed the importance of assessing the totality of the evidence in a case in making this

determination:

In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will

have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a perverse effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors. [Emphasis added.]

Id. at 695-696.

See also Wiggins v. Smith, 539 U.S. 510 (2003).

In Michigan, it is incumbent on a defendant, who bears the burden of proof on this issue, to make a testimonial record in the trial court if facts

not on the record are required to establish the claim. People v. Ginther, 212 N.W.2d 922 (Mich. 1973); People v. Tranchida, 346 N.W.2d 338 (Mich.

Ct. App. 1984).

Petitioner Dufresne urges this Court to order an evidentiary hearing in this case to explore trial counsel's failure to properly investigate and

contest this case.6 Mr. Dufresne now asserts that outcome-determinative failures on the part of trial counsel should be

---

6 Petitioner recognizes that a limited Ginther hearing was conducted in the state trial court on October 25, 2007 by order of the Michigan Court of Appeals on direct appeal. However, this hearing was sharply limited to the issue of trial defense counsel Klawuhn's failures with respect to the improper introduction of evidence that Petitioner belonged to a white supremacy group, and his failure to object to the highly prejudicial prosecutorial misconduct in introducing flawed evidence that improperly and incorrectly suggested that the white supremacy group, and Mr. Dufresne, were involved in the murder of the family of a federal judge in Illinois. This issue has already been preserved for federal habeas review. Failure to cover Mr. Klawuhn's failure to investigate and present a defense, and other failures raised herein, in this original Ginther hearing, was the fault of direct appeal counsel, and this aspect is covered in Issue III, infra.

---

considered by this Court after a full hearing.7 Because Petitioner Case has requested a hearing at all levels of the state court system and has

submitted substantial materials in support of that request, an evidentiary hearing is not barred by Cullen v. Pinholster, supra. See Wellons v. Hall,

558 U.S. 220; 130 S.Ct. 727; 175 L.Ed.2d 684 (2010); Winston v. Pearson, 683 F. 3d 489 (4th Cir. 2012). It was clearly an abuse of discretion on this

record for the trial court, the Michigan Court of Appeals, and the Michigan Supreme Court to refuse an evidentiary hearing. Under Pinholster, supra,

this Court must assess the reasonableness of the state court determinations on federal constitutional issues in light of what the state courts had in

front of them when they made their rulings – including the material that Petitioner put before them by way of affidavits, offers of proof, and other

material submitted in support of the request for an evidentiary hearing in state court. This Court can accept the validity of this material in assessing

whether Petitioner has met his burden under the AEDPA and can then order a hearing to validate any facts essential to its ruling.

It is clear that even in the wake of Cullen v. Pinholster, supra, the AEDPA does not bar an evidentiary hearing if a Petitioner was diligent in his

pursuit of a hearing but his claims remain undeveloped in state court. See Han Tak Lee v. Glunt, 667 F.3d 397,

---

7 The United States Supreme Court has outlined the critical need to develop a testimonial record post-conviction on the issue of ineffective assistance of trial counsel. In Massaro v. United States, 538 U.S. 500 (2003), the Court discussed the need to show "that counsel's actions were not supported by a reasonable strategy and that the error was prejudicial." Id. at 1694. In other words, a hearing is necessary to show that the Strickland standards have been met. Federal courts have consistently held that it is error when a state court fails to allow a defendant, who has diligently sought a hearing, the opportunity to develop a factual base for issues he is attempting to raise on appeal. Greer v. Mitchell, 264 F.3d 663 (6th Cir. 2001); Murphy v. Johnson, 205 F.3d 809 (5th Cir. 2000); Barnes v. Elo, 231 F.3d 1025 (6th Cir. 2000); Baja v. Ducharme, 187 F.3d 1075 (9th Cir. 1999).

405-406 (3d Cir. 2012). See also Sheppard v. Bagley, 657 F.3d 338, 343-344 (6th Cir. 2011), Winston v. Pearson, supra, and Robinson v. Howes, 663

F.3d 819, 822-825 (6th Cir. 2011), where the court made it clear that if Petitioner diligently attempted to make a record in state court but was

prevented, the issue can be considered after an evidentiary hearing in federal court, and consideration is under the pre-AEDPA standard of review

(de novo) because the state courts could not have made a merits ruling on matters they refused to allow a Petitioner to develop. See also Rayner v.

Mills, 685 F.3d 631, 638 (6th Cir. 2012); Robinson, supra. In Robinson, supra, the Sixth Circuit assessed the recent United States Supreme Court

decision in Cullen v. Pinholster, supra, limiting federal review on habeas to the record presented to the state court. The Robinson court clearly found

that this limitation does not apply where the federal claim at issue was never adjudicated in the state court in the first instance. See also Harris v.

Thompson, __ F. 3d __ (2012 WL 4944325, decided October 18, 2012, 4th Cir.).

A. **Failure to Investigate Prior Statements of Petitioner and Complainant and Failure to Introduce Critical Impeaching Material from these Statements**

A review of the taped interview of Joel Dufresne in Florida by Trooper James Armstrong and MSP Detective Gwen White-Erickson, on March 9,

2006 (T II 176), reveals that Mr. Dufresne requested a lawyer repeatedly between the 23 and 25 minute mark on the tape. The improper, highly

prejudicial, and unconstitutional use of this claimed act of "lawyering up" by the prosecution at trial in this case was preserved on direct review for

later federal habeas litigation (see Issue IV, infra). The prejudice of this suggestion, and the implied suggestion that Mr. Dufresne was

uncommunicative, hence uncooperative, from this point forward, was communicated to the jury at trial by Detective White-Erickson. After

repeatedly emphasizing that Mr. Dufresne had requested a lawyer, White-Erickson clearly agreed that Mr. Dufresne was not "interviewed or

interrogated anymore after that" (T II 102). Indeed, when asked whether Mr. Dufresne was in her presence after he exercised his right to counsel,

she implied that any statements he made after this point in her presence occurred the next morning "when we picked Mr- the Defendant up from the

Clay County Jail" (T II 102).

The problem with White-Erickson's testimony, and the implications flowing from it, is simple: it is blatantly false. The interview/interrogation of

Mr. Dufresne by the trooper and the detective on March 9 proceeds for 3 hours, 14 minutes and 30 seconds, nearly 3 full hours after Mr. Dufresne

twice exercised his right to counsel. During that period Mr. Dufresne continued to answer the questions of the detectives and, importantly,

continued to profess his innocence of forcing non-consensual sex with the complainant. Had trial defense counsel reviewed the tape of the interview

of Mr. Dufresne in Florida he would have understood this, and he would have been able to effectively impeach White-Erickson's suggestion at trial

that the interview/interrogation ceased when Mr. Dufresne requested a lawyer. Trial defense counsel would have been able to counter the suggestion

that Mr. Dufresne was uncooperative, and he would have been able to blunt the improper and unconstitutional suggestion that Mr. Dufresne

"lawyered up" and stopped the interview. But most importantly, again, trial defense counsel would have been able to show that Mr. Dufresne was

consistent and repetitive regarding his claim that there was no forced sexual activity. Trial defense counsel's failure to review the tape and utilize it

for these purposes at trial is a highly prejudicial error that satisfies both prongs of the Strickland standard.

It is also obvious that trial defense counsel failed to review and appropriately utilize the interview of complainant Angela W-------- by Detective

Gwen White-Erickson, an interview which took place on February 23, 2006, and which lasted 90 minutes.8 During the interview, and at trial, Ms.

W-------- described various assaults on her by Mr. Dufresne. There is no doubt that this was a tempestuous relationship and, indeed, Mr. Dufresne

does not deny some of the assaultive behavior. He merely indicates the physically assaultive activity was mutual. However, Mr. Dufresne was not

charged with assault, he was charged with multiple counts of first degree criminal sexual conduct, and he has always denied that he assaulted Ms.

W--------in relation to their sexual activity, or that he in any way forced her to engage in unusual sexual activity.9 The only counter to his claim is

Ms. W--------'s testimony. Thus her credibility was of the utmost importance.

Indeed, Dr. Samuel Minor found nothing out of the ordinary when he conducted a digital rectal exam (T II 60). He did note a centimeter long

healing abrasion of the rectal lining discovered with the use of instruments, and he stated his insertion of the instruments caused a re-bleed (T II 60-

61). However, while he could say such an abrasion was consistent with something placed in the rectum, he could not state what was placed in the

rectum, and he certainly could not tell whether such action, if it occurred, was consensual or forced. Cross examination of Dr. Minor revealed that an

earlier examination, including a

---

8 The 90 minute interview was provided on two 45 minute disks, each of which contain a number of tracks (the first disk contains 9 tracks and the second contains 10). The disks will be referenced as Part I and Part II and the specific track within each part will be noted when citing to this material.

9 Mr. Dufresne does not deny that he and Ms. W-------- engaged in what might be considered unusual, or even "perverted" sexual activity, he simply and consistently states that she at all times engaged in such activity freely and consensually.

---

digital rectal exam, In January of 2006, during the period when the complainant testified she was being repeatedly sexually assaulted, was normal (T

II 72-76).

In the face of this clear one-on-one credibility contest, trial defense counsel overlooked the opportunity to confront the complainant with

obvious and telling discrepancies between her original statement to police and her later testimony at trial in this case. The critical nature of the

inconsistencies suggests only one conclusion: trial defense counsel never bothered to analyze Ms. W--------'s original 90 minute statement to police.

Such a failure virtually automatically qualifies as performance below an objective standard of reasonableness in a case such as this, qualifying under

Strickland's first prong, and the prejudice is overwhelming given the importance of Ms. W--------'s credibility on the criminal sexual conduct claims

– if she lied about some of this, the jury would very likely have concluded that she lied about it all.

There can be no doubt that Angela W--------'s testimony on the sexual assaults alleged here was scripted. Indeed, at exam she used a "cheat

sheet," a written guide designating the assaults as A through H (PET 11-32). Paragraph G at exam, also testified to at trial, involved a claim that Mr.

Dufresne, while Angela was at home suffering from the flu, forced oral sex and forced anal sex while she was suffering from diarrhea (PET 30-31; T II

23-24). The problem is that her stories about this sequence were widely divergent each time she told them. During her statement to police she

claimed that the oral sex occurred on a Tuesday and the anal sex on a Thursday (Disk, Part II, tracks 6-7). Angela was very clear when making this

statement that there was no oral sex preceding the anal sex during her bout of diarrhea. At exam, the incidents were now one day apart, and her

children were "out there, he could hear them" (PET 30-31). At trial the children were now at her parents' home

during this sequence, **and the forced anal sex during the bout of diarrhea came immediately after repeated bouts of forced oral sex** (T II 23-24).

The anal sex during a bout of diarrhea was a major theme. The detail was precise. Angela claimed to remember it well, and each time spoke

about Joel's disgust with "poop all over his dick" (T II 24). Her problem was that each time she told the story the precise detail changed – a classic

signal of prevarication. First her children were present, then they were not. More important, she was initially insistent, during her original statement

to police, that there was no oral sex involved on the day Joel forced anal sex while she was suffering from diarrhea, an act which occurred two days

after the forced oral sex. Then, at exam, these different sexual assaults occurred one day apart. Finally, at trial, repeated forced oral sex immediately

preceded the forced anal sex during diarrhea. The failure of trial defense counsel to do the investigatory work necessary to catch these discrepancies

surrounding a major theme of the complainant's allegations – again, a definitive "tell" of untruth – in this one-on-one credibility contest alone

satisfies Strickland's review standard and demands the grant of a new trial. But there is much more.

Another major theme of Angela's allegations here, purportedly buttressed by Dr. Minor's testimony, and developed in substantial detail, was

the claim of repeated forced anal insertion of a piece of a Fisher Price ring toss toy. Angela admitted that the first insertion of the Fisher Price toy

occurred while she was in Michigan and Mr. Dufresne was in Florida. Subsequent forced insertions were done by Mr. Dufresne, according to Angela.

These subsequent forced insertions were developed during her various statements in detail. Again, however, the detail is widely divergent, clearly

unmasking a lie.

At exam, Angela was insistent that there were only two instances where Joel forced anal insertion of the Fisher Price toy. The first time this

occurred in the bathroom while she was placed over the edge of the tub, and the second time came two days later in the bedroom where she was

placed over the edge of the bed (PET 25-27). She testified consistently about this at trial (T II 10-15), again insisting that the first time Joel did this to

her he did it in the bathroom. However, in her original statement to police (Disk, Part II, tracks 2-3), Angela insisted, in abundant detail as to

location, that Joel inserted the ring toss toy piece into her anus on 5 different occasions. These five occasions occurred in the kids' room (specifically

delineating that this was the room with the bunk beds and the act occurred on the floor), twice in the living room, and on two more occasions in the

bedroom. Despite the fact that in her original statement to police this occurred on five different occasions, it did not happen once in the bathroom.

At trial and at exam Angela was insistent that the first time this occurred was in the bathroom while she was bent over the tub, while in her original

statement to police **she emphasized that the first time this occurred was in the living room at nigh**t. At trial the first incident occurred

in early January but in the original statement it happened 3 weeks after Joel returned home from Florida, placing this action in the latter part of

January. At trial Angela further defined only two occasions of this insertion, insisting that she threw the Fisher Price toy away after the second

incident (T II

14).10

---

10 Inexplicably, during her original statement, Angela noted at one point, prior to repeatedly stating that the forced insertion occurred 4-5 times, that she threw the toy away "after the second time." This internal inconsistency in the original statement would

explain why the scripted testimony at exam and at trial reverted to only two instances, though it certainly doesn't explain the blatant inconsistency as to location of the first event.

_____

Again, such major inconsistencies, accompanied by an abundance of detail, as to an incident which was a major theme of the complainant's

allegations, would have made a huge difference in how the jury viewed Angela's credibility in this one-on-one credibility contest. Failure of trial

defense counsel to investigate and provide the jury with this information is a blatant violation of Strickland and constitutes constitutionally deficient

performance.

The impact of these failures cannot be underestimated. This case was a straight-up credibility contest as to the key contested issue given the

state charges – whether the 'perverted' sex was consensual or forced. The jury's verdict hinged on whether they believed Angela or not. Had Mr.

Klawuhn done proper research on the facts of this case, he would have been able to question Angela on the crucial inconsistent statements outlined

above. He could have chipped away at her credibility with each inconsistency. Given the lack of any evidence beyond Ms. W--------'s claim that the

sexual activity engaged in by her and Mr. Dufresne was not consensual, it is clear that the jury would surely have reached a different verdict had they

been aware of the inconsistencies.

The inconsistent statements question the veracity of the allegations. It is a basic rule of evidence that a witness may be impeached with a prior

inconsistent statement. This is a traditional and important truth-seeking device of the adversarial process. See Harris v. New York, 401 U.S. 222, 225

(1971); Mich. Rules Evidence 613.

Numerous cases have found ineffectiveness for failure to impeach key witnesses, See, e.g., Driscoll v. Delo, 71 F.3d 701, 710 (8th Cir. 1996)

(failure to question witness with prior inconsistent statement made to investigators constituted deficient performance); Nixon v. Newsome, 888 F.2d

112, 115-16 (11th Cir. 1989) (failure to

impeach with prior inconsistent testimony “sacrificed an opportunity to weaken the star witness’ inculpatory testimony”); Blackburn v. Foltz, 828

F.2d 1177, 1183-84 (6th Cir. 1987) (counsel deficient where he failed to impeach an eyewitness with previous inconsistent identification testimony

when “weakening [the witness’] testimony was the only plausible hope [the defendant] had for acquittal”); Sparman v. Edwards, 26 F. Supp. 2d. 450,

454-55 (E.D.N.Y. 1997) (finding counsel ineffective when he failed to cross-examine child sexual abuse victims about inconsistent statements made

to the police).

Indeed, in 2008, two years after trial in this case, the Michigan Supreme Court remanded a case to the state trial court for a Ginther hearing to

determine if counsel was ineffective for “failing to cross-examine the complainant regarding inconsistencies in her trial testimony, and between her

trial testimony, preliminary exam testimony, and what she claimed in the initial police report.” People v. Brown, 775 N.W.2d 190 (Mich. 2008).

While a decision not to impeach a witness, or to elicit their prior testimony, can be a matter of trial strategy, such strategy must be reasonable

to defeat a claim of ineffective assistance. See Harris v. Artuz, 288 F. Supp. 2d. 247, 257-260 (E.D.N.Y. 2003) (finding counsel ineffective where he

failed to impeach the credibility of witnesses with evidence that would have aided defense’s theory of misidentification; this could not be dismissed

as trial strategy, as there would have been no downside). See generally, People v. Dalessandro, 419 N.W.2d 609, 614 (Mich. Ct. App. 1988).

There was no reasonable trial strategy which would explain trial counsel’s failure to impeach Angela W-------- with the critical, detailed, and

very obvious inconsistent statements regarding the number of times, and the locations, of the claimed forced use of the Fisher Price toy, particularly

in a case where the prosecution had to rely solely on the

complainant’s testimony. Nor was there any reasonably strategy to explain trial defense counsel’s failure to impeach Ms. W-------- with the

abundance of discrepancies in her very detailed story regarding the forced sexual acts allegedly perpetrated while she was sick with the flu. The prior

inconsistent stories told would have provided critical evidence that Angela was fabricating her claim of lack of consent.

Petitioner Dufresne meets the requisite standard of prejudice. It is likely that, had the jury been aware of the conflicting stories in this case, they

would have reached a different conclusion. Mr. Klawuhn's failure to adequately cross-examine complainant Angela W-------- deprived the jury of the

chance to hear critical evidence. The writ should be granted.

As noted above, one available course for this Court is to assess the information provided above, and, if this Court finds this information

sufficient to allow the grant of the writ, hold a confirmatory evidentiary hearing. Petitioner would also urge this Court to assess the state trial court's

analysis for reasonableness under Strickland, as the state trial court had the facts outlined above in front of it and used them in making its

determination that Strickland was not violated.

For purposes of determining if AEDPA deference applies, "the decision we review is that of 'the last state court to issue a reasoned opinion on

the issue.'" Joseph v. Coyle, 469 F.3d 441 (6th Cir.2006) (citations omitted); see also Ylst v. Nunnemaker, 501 U.S. 797, 803-804 (1991) and

Guilmette v. Howes, 624 F.3d 286, 291 (6th Cir. 2010) (en banc). When, as here, a state trial court provides a detailed opinion and an appellate court

affirms that decision in a summary fashion, without adding anything to the lower court's reasoning, the trial court's opinion is the "last reasoned"

decision for purposes of

determining whether AEDPA deference applies. See Bond v. Beard, 539 F. 3d 256, 289 (3rd Cir. 2008), cert. denied, 130 S.Ct. 58 (2009); Mark v.

Ault, 498 F.3d 775 (8th Cir.2007); the Sixth Circuit's decision in Joseph, supra; Sweet v. Secretary, Dept. of Corrections, 467 F.3d 1311 (11th Cir.

2006); Gunter v. Maloney, 291 F.3d 74 (1st Cir. 2002); Bledsue v. Johnson, 188 F.3d 250 (5th Cir. 1999); and Boyd v. French, 147 F.3d 319 (4th Cir.

1998).

In relation to the argument outlined above regarding trial defense counsel's failure to investigate and utilize the pre-trial statements of

Petitioner and complainant, the last reasoned state court opinion is the July 15, 2011order denying all relief issued by the state trial court on

postconviction, accompanied by an 11-page Opinion (attached as Exhibit F). At pp. 3-4 of the opinion the trial court conflates innocence with the

cause/prejudice analysis, and inexplicably focuses on an assaultive situation out of another county that was never charged. There was never any

denial that the relationship between Joel Dufresne and complainant Angela W-------- was tempestuous and mutually assaultive, as outlined in these

pleadings and in the appendices. The Cadillac, Michigan, assault incident was never prosecuted, probably because Angela Wiertalla told police she

had been assaulted by someone other than Joel Dufresne. Assuming Dufresne did the assault, a sentence after a conviction of assault, or even assault

with intent to do great bodily harm, would not be inappropriate. However, that is not the issue here. The issue here is whether the unusual sex acts

engaged in by Dufresne and Wiertalla were consensual or forced, or whether they even occurred in the manner testified to by the complainant. In

these constitutionally flawed proceedings the jury found they were forced, and Mr. Dufresne is serving 50-75 years for this, not for any alleged

assault.

The state trial court's assessment of Mr. Dufresne's sexual practices and his behavior on the witness stand attest to the fact that Mr. Dufresne

made a very bad impression on the state trial court. Indeed, much of this has to be laid at the doorstep of trial defense counsel, who clearly failed to

prepare his client to testify. However, disdain for a criminal defendant does not justify depriving him or her of federal constitutional rights.

Defendant's "seething anger" on the stand, and his "unapologetic admissions of beatings he administered" (trial court opinion, Exhibit F, at p. 5),

where no assault was charged, have nothing to do with whether the charged sex acts ever occurred, or whether W-------- consented to the sex acts

described by her and made the basis for a sentence which will surely cause Dufresne to die in prison.

And whether Mr. Dufresne's demeanor, language, and appearance while on the stand were up to par (Id. at p. 6) does nothing to detract from the

serious constitutional deficiencies on the part of trial defense counsel, not the least of which was the complete failure to impeach the complainant

with a series of substantial inconsistencies, as noted above, regarding the sex acts charged here, inconsistencies which would surely, if brought to

the attention of the jury, within a reasonable probability, result in a different outcome.

At p. 8 of its opinion, the state trial court states that the assertion that critical impeaching material was suppressed due to its pre-trial ruling is

"plainly false," and supports that conclusion with the notion that the ruling granting the prosecution's request to suppress as to all matters raised,

including contested matters, could be revisited at trial. Any ruling can be revisited, and certainly defense counsel's failure to do so is part and parcel

of the argument that he was constitutionally ineffective. This truism hardly turns a

claim that the trial court grievously erred in ruling this evidence out in the first place into one that is "false."

The opinion bounces from one irrelevant diatribe against Petitioner Dufresne to another, never quite focusing on the actual issues raised. The

substantial and precise errors on the part of trial defense counsel outlined in these pleadings, and presented to the state trial court, are in large part

not discussed. The opinion also contains unreasonable fact determinations as to the issues raised. For instance, in opining that direct appeal counsel

was not ineffective, the court notes that Mr. Dufresne's affidavit, at Exhibit A, states that he told trial defense counsel about a number of witnesses

but the affidavit fails to state Dufresne told direct appeal counsel. The state trial court simply ignores the fact that trial defense counsel outlined all of

these witnesses in a defense witness list filed prior to trial, a document that direct appeal counsel would certainly be held to have seen, or, minimally,

would have been obligated to review.

Finally, at pp. 10-11 of its opinion, the state trial court denies a reasonably likely chance of acquittal by focusing on irrelevant matters (the

assaultive behavior that was never charged) and by taking a series of items out of context. The state trial court never deals with the substantial

evidence never brought to bear on this one on one credibility contest, where the complainant's claims are uncorroborated, with respect to the

precise point at issue here – whether the sex acts were consensual or forced and, indeed whether much of the charged sexual activity ever occurred

in the manner testified to by the complainant. This evidence, including the substantial inconsistencies in the complainant's reporting of the alleged

sexual violations, would undoubtedly have impacted the complainant's credibility here to the point where there was indeed a

reasonable probability of a different result. The state trial court's opinion on the federal constitutional issues raised on postconviction either ignores

the critical issues altogether (which engages de novo review by this Court), or unreasonably applies Strickland and other clear United States

Supreme Court precedent, and includes unreasonable fact determinations on this record.

B. Trial Defense Counsel's Failure to Investigate and Present Fact Witnesses and General Facts Pertaining to Complainant's Credibility.

Mr. Dufresne had a substantial defense if only trial defense counsel would have done his job by investigating and presenting it. In Strickland, the

Court emphasized the importance of counsel's investigatory duties, and, though agreeing that strategic choices made "after thorough investigation

of law and facts relevant to plausible options" are sacrosanct, "choices made after less than complete investigation are reasonable precisely to the

extent that reasonable professional judgments support the limitations on investigation." Strickland, supra at 690-691. A decision not to investigate

must be "directly assessed for reasonableness." Id. at 691. See also People v. Grant, 684 N.W.2d 686, 691 (Mich. 2004).

There is no failure of advocacy more basic, or damaging, than the failure to pursue and present a substantial defense. Washington v. Texas, 388

U.S. 14, 19 (1967); Chambers v. Mississippi, 410 U.S. 284, 294 (1973). In Taylor v. Illinois, 484 U.S. 400, 408-409 (1988), the Court held that "[t]he

need to develop all relevant facts in the adversary system is both fundamental and comprehensive." The Michigan Supreme Court recognized, in

People v. Pickens, 446 Mich. 298, 311; 521 N.W.2d 797, that "Michigan law has long required that defense counsel present a reasonable defense."

The necessity of pretrial investigation and preparation cannot be overstated, or even compensated for by skill and experience. Strickland's

performance standard of reasonableness requires counsel to make pertinent factual and legal inquiries, and to allow adequate time for trial

preparation and development of strategies and defenses. As the court put the matter in United States v. Barbour, 813 F.2d 1232, (C.A.D.C. 1987),

quoting from Crisp v. Duckworth, 743 F.2d 580 (7th Cir. 1984):

'Effective representation hinges on adequate investigation and pretrial preparation . . . [for] investigation may help an attorney develop or even discover a defense, locate a witness or unveil impeachment evidence.' Id. at 583 (citing United States v. DeCoster, [159 U.S. App D.C. 326, 333;] 487 F.2d 1197, 1204 [1973])."

As to counsel's investigatory duties, Strickland referenced the ABA Standards. In the ABA Standards, Criminal Justice Standards, The Defense

Function, Part IV, Standard 4-4.1, the duty to investigate is laid out clearly:

Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

In this case trial defense counsel made critical investigatory errors. Despite filing a lengthy witness list (Exhibit E), he appears not to have

contacted any potential witnesses (see affidavits, Exhibit A; offer of proof, F. Martin Tieber, Exhibit D). If trial defense counsel had engaged minimal

investigatory effort he would have come upon substantial impeaching evidence, and substantial evidence directly impacting the credibility of the

complainant, Angela W--------, whose uncorroborated testimony has

resulted in a sentence of death in prison in this case. See Statement of Facts, supra, and Issue II, infra, for a detailed listing and analysis of the

substantial proofs that were neglected by trial defense counsel's complete lack of investigatory effort.

A major investigatory failure also left the jury with the impression that Petitioner Joel Dufresne was complicit in the death of the family of a

Federal Judge in Illinois. A more prejudicial scenario cannot be contemplated. Minimal investigatory effort would have revealed that Mr. Dufresne

was under the watch of the Michigan State Police for nearly a year prior to surfacing of the allegations in this case regarding the death of the Federal

District Judge's family in Illinois, and that for most of that year it had been abundantly clear that Mr. Dufresne and the organization to which he

belonged at that time were not responsible for the death of the Judge's family. If trial defense counsel had done his job, he would have been able to

tell the jury in this case, after the prosecution severely prejudiced Mr. Dufresne with this outlandish allegation, that the Federal Judge's family was

murdered by an imbalanced electrician, acting alone, who was disturbed over the dismissal of a med-mal case by the judge. This man was not

connected to Mr. Dufresne or the organization to which Mr. Dufresne belonged in any way.

These severe lapses clearly show that trial counsel's performance fell below an objective standard of reasonableness. In light of the

uncorroborated evidence from Angela Wiertalla, evidence with serious problems that are raised herein, these deficiencies must be considered

outcome-determinative under Strickland.

Employing the "look-through" doctrine as outlined above, the state trial court's opinion must be seen as either not assessing the various points

of the claim of investigatory failure on the part of trial defense counsel, or unreasonably applying

Strickland to these arguments. Attempting to defend its pre-trial ruling granting the prosecution omnibus pre-trial suppression motion in full, the

state trial court offered the claim that trial defense counsel could have argued it again at trial. Obviously trial defense counsel failed to do that –

because he clearly failed to investigate and find the substantial and critical witnesses and information outlined in the fact statement and in Issue II,

infra, as did direct appeal counsel. The trial court's assessment that much of this information was either inadmissible (under the rape shield statute)

or not productive (because, for instance, the complainant's enjoyment of 'wild and unusual' sex would not encompass the activities outlined in this

case based on, seemingly, the trial court's own moral standards), unreasonably applies Strickland given the critical information supplied to the state

courts, including the state trial court, on postconviction, and set out in Exhibits A-E. See analysis of the evidentiary points in Issue II, infra.

Finally, as to the failure to object to the severe and outcome-determinative prosecutorial misconduct outlined in Issue V, infra, trial defense

counsel was clearly ineffective. This matter was raised on direct review, trial defense counsel admitted his failure in objecting to this, and,

presumably, his failure to investigate and correct the notion that Petitioner was involved in the murder of a federal judge's family in Chicago, and the

state court of appeals on direct review presumed error. The state court of appeals went on to conclude that no prejudice has been established under

Strickland's second prong, an unreasonable application of Strickland on these facts (see, again, Issue V, infra).

The writ should be granted. Minimally this Court should grant an evidentiary hearing to explore this issue in detail and to make a record of the

matters outlined in these pleadings.

II. PETITIONER WAS DENIED HIS FEDERAL DUE PROCESS RIGHT TO PRESENT A DEFENSE, AND HIS FEDERAL CONSTITUTIONAL RIGHT TO CONFRONTATION (U.S. CONST., AMENDS. V, VI & XIV), WHEN WITNESS INTIMIDATION, AND RULINGS OF THE TRIAL COURT, ALONG WITH INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL (ISSUE I, SUPRA), PROHIBITED EXPLORATION OF AREAS CRITICAL TO FACTUAL SUPPORT OF HIS DEFENSE THAT THE CHARGES IN THIS CASE RESULTED FROM A FALSE ALLEGATION.

Whether rooted directly in the Fourteenth Amendment's Due Process Clause or in the Compulsory Process and Confrontation Clauses of the Sixth

Amendment, there can be no doubt that the federal constitution provides the accused a meaningful opportunity to present a complete defense.

Washington v. Texas, supra; Davis v. Alaska, 415 U.S. 308 (1974); Crane v. Kentucky, 476 U.S. 683 (1986). It is also clear that evidentiary error can

deprive an accused of his rights to fundamental fairness and due process of law. Walker v. Engle, 703 F.2d 959 (6th Cir. 1983) cert. denied, Marshall

v. Walker, 464 U.S. 951 (1983); People v. Adamski, 497 N.W.2d 546 (Mich. Ct. App. 1993).

Twenty-six years ago, the United States Supreme Court recognized that "[t]he right of an accused in a criminal trial to due process is, in essence,

the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, supra. Because the accused is entitled to defend

himself against the state's accusations, "[f]ew rights are more fundamental than that of the accused to present [evidence] in his own defense." Id. at

294. Denial of the accused's right to present a defense "calls into question the ultimate integrity of the fact-finding process." Id. at 295.

The essence of the right to present a defense is the entitlement to present the "defendant's version of the facts as well as the prosecution's to the

jury so it may decide

where the truth lies." Washington v. Texas, supra at 19. For this reason the trial judge impermissibly invades the province of the jury when defense

evidence is prohibited. People v. Martin, 298 N.W.2d 900 (Mich. Ct. App. 1980). "[W]here constitutional rights directly affecting the ascertainment

of truth are implicated [evidence rules] may not be applied mechanistically to defeat the ends of justice." Chambers v. Mississippi, supra at 313.

Exclusion of evidence is unconstitutionally arbitrary where it infringes on a weighty interest of the defense – where it "significantly undermined

fundamental elements of the defendant's defense." United States v. Scheffer, 523 U.S. 303, 308 (1998).

The prosecution in this case was allowed tremendous latitude in presenting evidence, while the defense was blocked from repudiating the vast

majority of that evidence. The defense was prevented from mounting a reasonable defense by the trial court's ruling granting the Prosecution's

Motion in Limine to keep out crucial evidence.11 This prohibited evidence was essential for Mr. Dufresne to present a defense, and his inability to do

so substantially interfered with his constitutional rights. Petitioner's due process right to present a defense was primarily infringed by mechanistic

application of state evidentiary rules in the face of a substantial and demonstrated need for introduction of critical and impeaching evidence.

The goal of the defense in this case was to challenge the prosecutor's assumption that Angela W--------'s relationship with Petitioner Dufresne

was replete with abuse

---

11 The People's Motion in Limine was filed on August 9, 2006 and argued on August 11, 2006.

---

solely attributable to Mr. Dufresne, while Ms. W-------- played absolutely no role in the destructiveness of the relationship. Further, the defense

needed to develop the reality that Angela's mental problems, as well as her desire to exact revenge upon Mr. Dufresne for taking their son to Florida,

and her desire to obtain full custody of their son, likely caused her to make a false allegation of sexual assault. Finally, the defense needed to show

that, contrary to her trial testimony, Angela W-------- engaged in and enjoyed 'wild and unusual' sex, thus impacting her claim that the sex acts

described by her in this case were not consensual. The constant cancellation of Petitioner's defense is detailed in the Statement of Facts, supra, and in

the appendices to this brief, but the crucial facts that were never brought out at trial will be simply outlined here:

• Angela claimed that the Petitioner consistently forced her to perform sex acts that she did not willingly wish to participate in, and that she found

disgusting. In fact, evidence from her statements to others, shows that Angela was sexually experimental, had solicited another woman for sex, and

engaged an active sex life with that included a lot of variety and experimentation. One witness (Erin Wood (Pendergraph)) states that her discussions

with Angela convinced her that Angela "enjoyed their [Angela and Joel's] somewhat wild and unusual sex life." See affidavits of Investigator Cuneo

and Erin Wood (Pendergraph), Exhibit A.

• Angela, according to various reports, had falsely accused her ex-boyfriend Leon Kerberskey, of assault, a claim that appears to have been

generated by custody issues (see PPO documents, attached in Exhibit C). At T II 29, Angela admitted that she falsely told police she had been beaten

up by

Leon Kerberskey. Police reports note that Kerberskey indicated that Angela was crazy, and he stated that Angela was violent toward him.

Kerberskey stated that others would support this claim. He also told police that Angela had told him that she had been raped by a previous boyfriend

(report of Trooper James Armstrong, March 27, 2006, attached in Exhibit C).

• Brandie Degroff, a former girlfriend of Joel Dufresne, stated that Joel Dufresne was not violent, but that she had information indicating that Angela

was violent, and Brandie feared Angela. Brandie saw marks on Joel that she believed were inflicted by Angela.

• Angela was caught stealing from Glenn's market. She was convicted of drunk driving, charged with a drug offense, OUIL causing serious injury, and

third degree retail fraud. During another arrest for open intox and violation of restricted driver's license, the officer narrative suggests Angela was

not truthful. While investigating a theft offense, another officer narrative suggests Angela initially lied to police and that her statement "did not make

any sense." Angela was also charged at one point with Obstructing Justice. See affidavit of Investigator Cuneo, Exhibit A; police reports, Exhibit C.

• Robert Poppel, who lived with Angela Wiertalla and Joel Dufresne off and on for years, indicated that Angela was prone to exaggeration. He insists

her trial testimony was greatly exaggerated. Poppel noted that Angela was

under psychiatric care and took psychiatric medications. See affidavit of Robert Poppel, Exhibit A. • In addition to Poppel's claims regarding

Angela's psychiatric problems, it is apparent that she was in rehab.

This, and other information outlined in police reports and witness statements in the appendices to this brief, contain an abundance of

impeachment material and material of direct relevance to Angela W--------'s credibility, evidence which should have been placed before the jury

deciding Mr. Dufresne's fate.

The application of the rape shield statute to bar any evidence of Angela W--------'s sexual proclivities, under these facts, was clear error.

Admittedly, the United States Supreme Court has acknowledged that a legitimate state interest exists in protecting rape victims. Michigan v. Lucas,

500 U.S. 145 (1991). However, the Supreme Court in the same case acknowledged that the competing interests of (1) protecting a rape victim from

harassment or invasion of privacy, for example, and (2) protecting a defendant's constitutional rights may require a resolution in favor of the

defendant. Balancing must be performed. Id.12

Mich. Rules Evidence 607 states, "[t]he credibility of a witness may be attacked by any party, including the party calling the witness." Mich.

Rules Evidence 613(b) permits the examination of a witness about a prior inconsistent statement. Inconsistent

---

12 See also People v. Hackett, 365 N.W. 2d 120, 124 (Mich. 1984) (In some situations, evidence relating to the victim's sexual conduct "may be required to preserve a defendant's constitutional right to confrontation"); People v. Adair, 550 N.W. 2d 505, 511 (Mich. 1996) (Rejecting a reading of Michigan's rape-shield statute that would have "run the risk of violating a defendant's Sixth Amendment constitutional right to confrontation").

---

out-of-court statements of a witness are admissible for impeachment purposes. People v. Kohler, 318 N.W.2d 481, 483 (Mich. Ct. App. 1981). The

Michigan Court of Appeals has made clear that "in order to avoid denying the defendant a fair trial, even hearsay is admissible when critical to a

defense. In other words, [the defendant's] basic proposition – that a trial court may not completely eviscerate a defendant's attempt to cast doubt on

the prosecutor's proofs simply because the evidence proposed is hearsay – is correct." People v. Herndon, 633 N.W.2d 376, 397-398 (Mich. Ct. App.

2001).

Here, the repeated evidence that Angela W-------- engaged a sex life that was unusual and experimental, and enjoyed it, directly impeaches her

constant refrain that the unusual sex in this case was forced on her, and that she considered it abhorrent and repulsive. Indeed, Alechia Rocheleau

told Investigator Cuneo that she was solicited by Angela for sex.13

Even if it were held that Angela W--------'s past statements to others in this area could not be introduced substantively, they clearly could be

admitted as impeachment. People v. Brown, 178 N.W.2d 547 (Mich. Ct. App. 1970). And in light of their importance to Mr. Dufresne's due process

right to present a defense, this evidence must come in under a constitutional theory even if it could be argued that no state evidentiary

---

13 The recent plurality, en banc decision of the Sixth Circuit in Gagne v. Booker, 680 F.3d 493 (6th Cir. 2012) does not detract from the strength of Petitioner's argument here. In that case the state court's analysis of whether two instances of group sex were

admissible was deemed reasonable under AEDPA standards, an analysis that cannot be replicated here, and in Gagne it was critical that evidence that did come in made the same point, again not applicable here. While a reading of the various opinions in Gagne can be somewhat confusing, in totality the majority of the Sixth Circuit Judges would clearly support Petitioner Dufresne's position that, in this case, where the complainant's professed antipathy and disgust toward unusual sex substantially support her claims of being forced to engage in such acts with Petitioner, the clear evidence to the contrary would have been admissible.

---

provisions would escort it. Chambers v. Mississippi, supra at 313. See also People v. Stanaway, 521 N.W.2d 557 (Mich. 1994), where the Court made

clear that state evidentiary rules must yield to a defendant's due process right to present a defense. This type of testimony was critical to Mr.

Dufresne's defense as it would have highlighted the fact that he and Angela's sex life was risqué, but that she consented to this behavior. The trial

court's ruling that all of complainant's prior sexual conduct with Mr. Dufresne or anyone else was inadmissible was clear error on these facts.

In Mathis v. Berghuis, 90 Fed. Appx. 101, 107 (6th Cir. 2004), the Sixth Circuit stated that a defendant, "is not required to demonstrate that the

admission of this evidence [in a Michigan criminal sexual conduct case, undisclosed evidence of dubious prior claims of rape by the complainant]

would have resulted in a different verdict, but only that there is a reasonable probability that, had he had this evidence, the result of the proceedings

would have been different." There is no doubt here that, if Mr. Dufresne had been able to present the evidence outlined above concerning Angela

Wiertella's sexual proclivities, despite her insistence that Dufresne forced unusual sex on her, there is a reasonable probability that the result would

have been different.

The other critical area that was substantially neglected was Angela W--------'s credibility. This should have been attacked in many different

ways. Evidence of her prior theft offenses, and countless interactions with law enforcement where it was clear that she was not telling the truth, were

very pertinent and admissible. The trial court erred in excluding the "prior record of Complainant" pursuant to the prosecution motion in limine.

Mich. Rules Evidence 608(b) reads as follows:

b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness's privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Under this rule, the trial court had discretion to permit the defense to ask Angela Wiertalla about other incidents of conduct which were

relevant to her credibility and character for truthfulness. While the defense could not present extrinsic evidence of such conduct (such as testimony

from victims of the thefts committed by Angela), these matters could have been inquired into during the cross-examination of the witness herself.

See People v. Brownridge, 225 Mich App 291; 570 N.W.2d 672 (1997), rev'd on other grounds, 459 Mich 456 (1999).14

Evidence of the commission of larcenies is strongly probative of credibility and character for truthfulness. People v. Allen, 420 N.W.2d 499,

517 (Mich. 1988). The Michigan Supreme Court, in adopting the state's code of evidence, chose to treat theft

---

14 The Brownridge opinion from the Michigan Court of Appeals held it reversible error, under Mich. Rules Evidence 608(b), for the trial court to preclude the defense from impeaching the credibility of a key prosecution witness on cross-examination with evidence of an allegedly false statement on an affidavit. The Michigan Supreme Court reversed that decision, on the basis of a factual finding that the statement in the affidavit was in fact accurate, but did not hold that impeachment under the rule of evidence would have been improper had the prior statement been false.

---

crimes as it did crimes involving dishonesty or false statement, thus indicating a belief that theft crimes are more probative of veracity than other

crimes. Id.

Similarly, Judge Burger, in Gordon v. United States, 383 F.2d 936, 940 (C.A.D.C. 1967), stated:

In common human experience acts of deceit, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects adversely on a man's honesty and integrity. Acts of violence on the other hand, which may result from a short temper, a combative nature, extreme provocation, or other causes, generally have little or no direct bearing on honesty and veracity. A 'rule of thumb' thus should be that convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not.

Judge Burger's analysis and Mich. Rules Evidence 609, as originally adopted, suggest that crimes having an element of theft should be treated in

the same manner as false statement crimes. Likewise, the other instances of untruthfulness on Angela Wiertalla's part outlined in the police reports

described in the Statement of Facts, supra, and attached in the exhibits, are relevant and useful to impeach the complainant's credibility in this case.

Angela W--------'s credibility was a crucial issue for the jury. Indeed it was the only issue for the jury. Had the jury heard that Angela had committed

theft crimes and other acts of dishonesty in the past, their view of her credibility would have been significantly different.

It was an abuse of discretion to bar all defense inquiry during the cross-examination of Angela into prior convictions and the failure to inquire

into other areas of dishonesty deprived Petitioner Dufresne of his constitutional right to present a defense, as well as his right to the effective

assistance of counsel (Issue I, supra).

Finally, it is abundantly clear that Angela W-------- had substantial problems with drugs and alcohol and was in treatment, which included

psychiatric medications. All of this would have impacted her general credibility, and it was a violation of Mr. Dufresne's right to present a defense for

the trial court to completely rule out "complainant's mental health or her psychological or psychiatric care, including self-inflicted injury" and

"prior drug use of complainant" as outlined in the prosecution motion in limine (attached in Exhibit E). There was evidence in this case that Angela

W-------- lied, exaggerated, and brought false accusations against others to suit her interests. Her drug and alcohol abuse problems, and her issues

with law enforcement, clearly demonstrate substantial credibility issues. Whether the trial court's preclusion pursuant to the prosecution motion in

limine, or trial defense counsel's general investigatory inaction, precluded any examination of this area, the result is the same: Mr. Dufresne was

deprived of his federal constitutional right to present a defense when he was prevented from exploring Angela W--------'s litany of serious credibility

problems in relation to the particular charges brought here, and presenting relevant information to his jury.

• Police/Prosecution Intimidation

In this case there was substantial evidence that crucial witnesses were intimidated before and after trial. Investigator Cuneo notes that she ran into

this problem during her postconviction investigation of the case (Cuneo affidavit, attached in Exhibit A). Witness Robert Poppel indicated he was

told by the prosecutor and the "lady sheriff" to stay away from the trial. Kerry McGinn, Brandie Degroff's mother, who witnessed a physical

altercation between Angela W-------- and Petitioner Dufresne, was warned by police not to talk about this, and Brandie herself was intimidated by

this warning as well. Recently,

Loretta Perry, and investigator Cuneo herself, were subjected to unusual interviews by police (see affidavits, Exhibit A). Several other witnesses

including key witness Leon Kerberskey, are not responding to inquiries to date. See also, generally, Statement of Facts, supra.

Witness intimidation implicates a defendant's rights to present a defense, to cumpulsory process, and to a fair trial. Washington v. Texas, supra;

Webb v. Texas, 409 U.S. 95, 98 (1972). Indeed, several courts have held that a witness may have to be immunized to protect a defendant's rights

where prosecution intimidation has silenced the witness. United States v. Morrison, 535 F.2d 223, 228 (3rd Cir. 1976); United States v. Lord, 711

F.2d 887 (9th Cir. 1983). See also United States v. Smith, 478 F.2d 976, 979 (C.A.D.C. 1973); United States v. MacCloskey, 682 F.2d 468, 479 (4th

Cir. 1982); United States v. Whittington, 783 F.2d 1210, 1219 (5th Cir. 1986); United States v. Thomas, 488 F.2d 334 (6th Cir. 1973).

While trial counsel's investigatory failure, and the trial court's suppression of key defense evidence at the prosecution's behest, are the main

reasons why no defense was presented here, recent investigation discloses that witness intimidation may well have been a factor. This Court is urged

to grant a hearing to, among other things, explore the possibility that witnesses for the defense were warned off, thereby contributing to Mr.

Dufresne's loss of his federal constitutional right to present a defense.

• Conclusion

Relevant evidence is defined as evidence having any tendency to make the existence of any fact that is of consequence to the determination of

the action more probable or less probable than it would be without the evidence. See, generally, People v.

Yost, 749 N.W.2d 753 (Mich. Ct. App. 2008).15 Mich. Rules Evidence 401. All relevant evidence is normally admissible. Mich. Rules Evidence 402.

The underlying assumption of the rules of evidence is that the reliability of the truth-finding process is enhanced by the admission of all probative

evidence. People v. Dobben, 488 N.W.2d 726 (Mich. 1992); see Mich. Rules Evidence 102.

Once a defendant puts forth some supporting evidence for a particular theory it is for the jury to determine its sufficiency. Id. See also People v.

Hoskins, 267 N.W.2d 417 (Mich. 1978). The United States Supreme Court has consistently held that, under the due process clause of the federal

constitution, state evidentiary rules must yield to a defendant's right to present a defense when evidence is important and critical to that defense.

In Rock v. Arkansas, 483 U.S. 44 (1987), the Court held that a defendant's right to testify was violated by a state per se rule excluding

hypnotically refreshed testimony. In Crane v. Kentucky, supra at 684-686; the Court found that the state's exclusion of evidence surrounding the

taking of a confession, after it was determined to be voluntary, deprived defendant of the right to a fair trial. And, in Chambers v. Mississippi, supra

at 289-290, the Court reversed a state court conviction where the state trial judge, as here, after a hearsay objection, excluded testimony the

Supreme Court found to be critical to Chambers' defense (in that case testimony suggesting that someone else had committed the crime).

_____

15 Yost is instructive because, in that case, the trial court, as did the trial court here, repeatedly excluded relevant evidence that was important for the defense based on rote evidentiary objections of the prosecutor. The Michigan Court of Appeals found several of these exclusions grounds for reversal of Donna Yost's murder conviction.

_____

In Michigan, the prosecution is traditionally given wide berth in circumstantial cases, and the defense must be given the same leeway in developing

their case. In People v. Fleish, 32 N.W.2d 700, 707 (Mich. 1948), the Michigan Supreme Court stated:

In the reception of circumstantial evidence great latitude must be allowed. The jurors should have before them and are entitled to consider every fact which has a bearing on and a tendency to prove the ultimate fact in issue and which will enable them to come to a satisfactory conclusion. Many facts of no consequence in isolation may be proved because of the persuasiveness of their united effect. [Citation omitted.]

These general concepts, and the constitutional pillars of confrontation and the due process right to present a defense, certainly serve to ground

the conclusion that the state trial court erred in granting a prosecution motion in limine that completely cut off the defense in this case. In the case at

bar, Angela W--------'s credibility was a crucial issue for the jury, and all of the excluded evidence would have shed light on that credibility in a

highly relevant way. Whether through the trial court's grant of the prosecution's omnibus motion in limine, or through defense investigative failure,

or through witness intimidation, Mr. Dufresne had no defense. This the constitution will not allow.

To the extent that the evidence outlined above was addressed by the state trial court on postconviction, the last reasoned state court opinion

on this point, the state court unreasonably applied clear United States Supreme Court precedent and the writ should be granted. Because much of

this evidence was not considered by the state courts due to failure to provide a requested evidentiary hearing, this court can assume its truth in

assessing this issue on a de novo basis and, in its discretion, provide a confirmatory evidentiary hearing under the dictates of Cullen v. Pinholster,

supra.

III. PETITIONER DUFRESNE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FEDERAL CONSTITUTION (U.S. CONST. AMEND. VI) WHERE HIS APPELLATE COUNSEL, ON DIRECT APPEAL, NEGLECTED "DEAD BANG WINNERS."

A criminal defendant has a right to the effective assistance of counsel in his appeal of right to the Michigan Court of Appeals. Ross v. Moffitt, 417

U.S. 600, 610 (1974); Coleman v. Thompson, 501 U.S. 722, 756 (1991); Evitts v. Lucey, 469 U.S. 387, 391-400 (1984); People v. Reed, 535 N.W.2d

496 (Mich. 1995).

The Strickland standard is generally utilized16 and deference, though certainly not unlimited, is afforded to counsel's decisions. The Supreme

Court has recognized that a criminal Petitioner does not have a constitutional right to have appellate counsel raise every non-frivolous issue on

appeal. Jones v. Barnes, 463 U.S. 745, 754 (1983). However, courts have routinely insisted that Strickland mandates appellate counsel to have

sound strategic reasons for failing to raise important and obvious appellate issues, or "dead bang winners." Smith v. Murray, 477 U.S. 527, 536

(1986); Manning v. Huffman, 669 F.3d 720 (6th Cir. 2001); United States v. Cook, 45 F.3d 388, 395 (10th Cir. 1995); Houston v. Lockhart, 982 F.2d

1246 (8th Cir. 1993); Page v. United States, 884 F.2d 300 (7th Cir. 1989).

In Mapes v. Coyle, 171 F.3d 408 (6th Cir. 1999), the court set out a variety of factors to be assessed in making the determination of whether

appellate counsel rendered effective assistance. Key questions are whether the omitted issues were significant and obvious, whether the omitted

issues were stronger than the issues presented, whether

---

16 A key concern in this context is whether counsel's errors "have undermined the reliability of and confidence in the result." McQueen v. Scroggy, 99 F.3d 1302, 1311 (6th Cir. 1996).

---

there were objections at trial to the omitted issues, and whether Petitioner and appellate counsel met to discuss possible issues. See also Mapes v.

Tate, 388 F.3d 187 (6th Cir. 2004).

The key factor in this matter is the open and obvious nature of the errors that were missed by direct appeal counsel. The ineffective assistance of

trial counsel, including the failure to impeach with critical material from the prior statements of Petitioner and Complainant, and the denial of the

right to present a defense, should have been obvious to direct appeal counsel simply by noting that, after an extensive defense witness list was filed,

no witnesses were presented. A minimum of investigatory work would have immediately shown the worth of the issues, raised as Issues I and II,

supra. These issues are longstanding and open and obvious issues under state and federal jurisprudence. In the context of this case, they were of

substantial importance and must be considered outcome-determinative. Failure of appellate counsel to raise these issues on direct appeal denied

Petitioner Dufresne his federal constitutional right to the effective assistance of counsel on direct appeal, and constitutes cause under state and

federal procedural default rules. The determination of the state trial court on postconviction review to the contrary unreasonably applies clear

United States Supreme Court precedent, and the writ should be granted by this Court.

IV. THE MICHIGAN COURT OF APPEALS UNREASONABLY APPLIED DOYLE V. OHIO, AND ISSUED AN OPINION THAT WAS CONTRARY TO DOYLE, WHEN IT CITED A STATE CASE FOR THE PROPOSITION THAT FAILURE TO 'IMPUGN THE REQUEST FOR COUNSEL' OR 'CREATE ANY INFERENCE FROM THE INVOCATION OF THE RIGHT TO COUNSEL' ABSOLVED THE STATE FROM CONSEQUENCES OF REPEATED DOYLE ERROR.

This federal constitutional issue was preserved at trial by timely objection and was raise on direct appeal. There is no procedural default.

This Const. amend. V provides, in pertinent part: "No person shall be compelled in any criminal case to be a witness against himself." See also

Const. 1963, Art. 1, § 17. U.S. Const. amend. V, as applied to state prosecutions through the Due Process Clause of U.S. Const. amend. XIV, forbids a

prosecutor from introducing the defendant's post-arrest, post-Miranda silence, unless the defendant testifies to making a statement or cooperating

with the police, or claims not to have had a pre-trial opportunity to give a version of events. Doyle v. Ohio, 426 U.S. 610 (1976). In several decisions

subsequent to Doyle, the United States Supreme Court made it clear that a prosecutor's reference at trial to a defendant's silence after receiving

Miranda warnings was a clear federal constitutional violation. See Wainwright v. Greenfield, 474 U.S. 284 (1986); Greer v. Miller, 483 U.S. 756

(1987); Brecht v. Abrahamson, 507 U.S. 619 (1993).

In this case, the prosecution elicited the fact that Petitioner requested an attorney during interrogation from not one but two police witnesses.

Trooper Armstrong testified that he read Petitioner Dufresne the Miranda warnings and began a general discussion regarding Mr. Dufresne's arrest

and press coverage. However, when the trooper asked Petitioner a specific question about one of the incidents, Petitioner responded: "Before I

answer any specific questions, I want a lawyer" (T I 176-177). As if the introduction of that prejudicial fact were insufficient, Trooper Armstrong

added that this was what the police derogatorily refer to as "lawyering up" (T I 177). Surprisingly, the trial court overruled defense counsel's

objection to this testimony, depriving Petitioner of even a curative instruction.

Having established that the trial court would permit the testimony, the prosecution questioned Detective White-Erickson about the

interrogation. At this point the prosecutor was aware that the defense had objected to Petitioner's request for a lawyer before he would respond to

specifics. Nonetheless the prosecutor asked an open-ended question about the results of the interrogation and received the answer that was to be

expected: "And when he was given a specific instance, the Defendant said that he would like to speak to a lawyer" (T II 102). The prosecutor then had

the police witness provide an example of a "specific instance" and the witness stated "...it was the web cam, then he said that he wanted to speak to a

lawyer first" (T II 102). Finally, the prosecutor himself referenced the "lawyering up" in relation to specifics:

Q. Was there any conversation with the – well, you indicated that he requested a lawyer at that point. Did you have any more – was he interviewed or interrogated anymore after that?

A.No. He was not." (T II 102).

It was the repeated and dogged reference to silence after Miranda warnings regarding specific accusations that bring this scenario directly in line

with the clear proscription of the Doyle line of cases. The prosecutor's questioning deliberately elicited the fact of Petitioner's post-arrest, post-

Miranda invocation of his right to an attorney in relation to specific accusations that he later refuted at trial.

Petitioner never testified that he had been cooperative with the police or had not had an opportunity to make a statement. In fact, at the time

that the police officers testified, Petitioner had not yet testified. Therefore, this was not even introduced as impeaching evidence, but substantive

evidence regarding Petitioner's guilt.

There was corroborating testimony for Ms. W--------'s version of the facts, but the testimony also corroborated Petitioner's version. Petitioner

admitted to hitting Ms. W--------. Therefore, the question of the veracity of Ms. Wiertalla's allegations regarding the sexual abuse was reduced to the

credibility between Ms. W-------- and Petitioner. Under these circumstances, the repeated testimony and derogatory statements regarding

"lawyering up," especially as it was directed to specific allegations by the complainant of nonconsensual sexual activity, after Petitioner's invocation

of his constitutional rights, was highly prejudicial. The jury had to take from this, as the prosecution surely intended, that Petitioner's trial testimony

was filtered through his lawyer, was not spontaneous, and therefore was lacking in credibility. Under these circumstances it is very clear that, in line

with the analysis in Brecht v. Abrahamson, supra, the error here must be said to have substantially influenced the verdict of the jury. Petitioner

urges this Court to grant the writ due to this flagrant and repeated federal constitutional error.

The Michigan Court of Appeals issued the last reasoned decision on this point, on direct review. In its October 14, 2008 unpublished opinion,

that court, citing People v. Dennis, 628 N.W.2d 502 (Mich. 2001), held that despite the clear error the "police officers' testimony y did not violate

defendant's right to a fair trial." Since the court referenced "Dennis, supra at 628," a nonexistent jump page, it is difficult to ascertain its

thinking on this, but two factors clearly dictate the conclusion that the state appellate court unreasonably applied clear United States Supreme Court

precedent (Doyle, Brecht) in affirming Petitioner's conviction and sentence despite the repeated, flagrant, and pointed federal constitutional

infringement of Petitioner's right to remain silent in the wake of his Miranda warnings as outlined above.

First, Dennis was a case that involved a single question and answer in response to an open-ended question. And while the first violation in this

case could be said to mirror the situation in Dennis, the repeated reference to Petitioner's exercise of his right to silence after Miranda warnings with

yet another police witness after an objection from the defense during testimony of the first witness was clearly deliberate. Indeed, the second time

around the prosecutor in this case actually noted that Petitioner asked for a lawyer after his warnings in the course of the question. Second, The

Dennis court noted that the trial judge in that case gave a curative instruction after the objection. In this case, just the opposite occurred. Here, the

state trial court overruled the objection, sanctioning the prosecutor's repeated questioning concerning the Petitioner's exercise of his right to

silence with a second police witness.

Finally, there is nothing in the Doyle line of cases that requires that the prosecution 'impugn' a defendant's request for counsel as suggested by

the state appellate court in this case. Such a reading reinforces the clear conclusion that the state appellate court unreasonably applied United States

Supreme Court precedent on direct review. Nor do the United States Supreme Court cases on point demand that the prosecution do anything more

than lay out the exercise of the right to remain silent after Miranda warnings in order to "create the inference." Here, the repeated focus on

Petitioner Dufresne's exercise of the right to silence in conjunction with specific questioning more than qualifies as a clear federal constitutional

violation. Indeed, requiring that these markers be met in order to find a violation of Doyle is in fact a clear indication that the Michigan appellate

court's determination on this point on direct review was contrary to, as well as an unreasonable application of, clear United States Supreme Court

precedent.

The use of the Dennis case in this manner was objectively unreasonable. Under these facts, the state court of appeals unreasonably applied Doyle

and Brecht in finding that the repeated and pointed error did not violate Petitioner's federal due process right to a fair trial. This Court should grant

the writ.

V. THE MICHIGAN COURT OF APPEALS, ON DIRECT REVIEW, UNREASONABLY APPLIED CLEAR UNITED STATES SUPREME COURT PRECEDENT, AND UNREASONABLY DETERMINED THE FACTS, WHEN IT RULED THAT PETITIONER'S DUE PROCESS RIGHT TO A FAIR TRIAL (U.S. CONST. AMENDS. V, XIV) WAS NOT VIOLATED WHEN THE PROSECUTOR ENGAGED IN SEVERE AND REPEATED OUTCOME-DETERMINATIVE MISCONDUCT BY ASKING ABOUT PETITIONER'S CHARACTER– THAT HE HAD TIES TO A WHITE SUPREMACIST GROUP THAT WAS INVOLVED WITH THE MURDER OF A JUDGE'S FAMILY IN CHICAGO (A FALSE AND HIGHLY PREJUDICIAL CLAIM).

Defense counsel did not object to the prosecutor's arguments. The failure to object constitutes ineffective assistance of counsel under Strickland

(see Issue II, supra), and constitutes cause to overcome this procedural default. The issue of trial defense counsel's failure in this regard was raised

on direct appeal in the state courts, and is fully preserved. Prejudice with respect to this prosecutorial misconduct argument is overwhelming.

The Fifth and Fourteenth Amendments of the United States Constitution provide that an individual shall not be deprived of due process of law.

Improper prosecution tactics can violate this fundamental protection for the accused, and prosecutors are to refrain from tactics which result in

wrongful convictions, and to remain equitable and honest in their presentation of cases. Berger v. United States, 295 U.S. 78 (1935). The touchstone

of due process analysis in cases where prosecutorial misconduct is alleged is the fairness of the trial rather than the culpability of the prosecutor.

Smith v. Phillips, 455 U.S. 209 (1982).

Recently, in Parker v. Matthews, 132 S.Ct. 2148, 183 L.Ed.2d 32 (2012), the United States Supreme Court reaffirmed the essential nature of a

claim of prosecutorial misconduct on habeas review:

The "clearly established Federal law" relevant here is our decision in Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986), which explained that a prosecutor's improper comments will be held to violate the Constitution only if they " 'so infected the trial with unfairness as to make the resulting conviction a denial of due

process.' " Id., at 181, 106 S.Ct. 2464 (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)).

This test has been met in this case where the prosecution repeatedly introduced irrelevant and highly prejudicial information concerning the

fact that Petitioner had white supremacist views and belonged to a white supremacist organization, and, falsely, that Petitioner was being

investigated for involvement with the murder of a Federal Judge's family in Chicago because of his white supremacist leanings, in this one-on-one

credibility contest.

Petitioner was a former member of the "creativity movement," a white supremacist group. This fact is irrelevant to the criminal case against

Petitioner. His membership in this organization could prove no fact relating to the alleged crimes nor could it lead to any such fact. Because it lacked

any probative value, it was more prejudicial than probative. Given the common perception of white supremacists as hateful and violent, the

introduction of this evidence tended to encourage the jury to convict Petitioner based on his character, not the substance of the allegations.

That the evidence of white supremacy involvement was irrelevant here can be demonstrated by contrast to cases where the matter was relevant. In United States v.

Felton, 417 F. 3d 97 (1st Cir. 2005), the court noted that evidence of the defendant's involvement in a white supremacy organization was more

probative than prejudicial. It was needed in that case to show motive in relation to the charged offense (that the purpose in receiving explosives was

to kill or injure persons or property under 18 U.S.C. § 844(d)). Id. at 102. In Felton, the court also approved use of the term "terrorist" to describe

defendants since the "central conduct with which defendants were charged was a conspiracy to build a bomb to attack civilian targets to advance an

ideological cause." Id. at 103-104.

Here, the charge against Petitioner Dufresne was criminal sexual conduct. The case was a one-on-one credibility contest over whether the

unusual sex acts engaged in by Petitioner and complainant were consensual or forced. There was no purpose to introduction of Petitioner Dufresne's

white supremacist background other than to slime his character before the jury. See also United States v. Curtin, 489 F. 3d 935 (9th Cir. 2007);

United States v. Allen, 341 F. 3d 870 (9th Cir. 2003) (allowing prejudicial white supremacy evidence where the probative value was high in

prosecution for violating federal statutes protecting against the interference with federally protected rights on the basis of race and religion); United

States v. Cutler, 806 F. 2d 933 (9th Cir. 1986)(allowing evidence of membership in white supremacist gang because evidence was relevant to show

motive).

Again, the evidence was simply not relevant, and the Michigan Court of Appeals' unexplained claim to the contrary is unreasonable on this

record. A review of the preliminary examination testimony of the complainant and of Prosecution Exhibit 9 at Petitioner's state trial (a recording of

a lengthy telephone conversation between the

complainant and Petitioner) does not disclose any clear references to white supremacist or racist views or organizations. Nothing in the record

suggests that references to white supremacist views or involvement in white supremacist organizations was relevant to the issues to be decided at

trial. The information regarding the Cadillac 'skinhead" meeting/party could have been introduced without reference to such views without, in any

way, reducing its probative value for the prosecution. Trial defense counsel's suggestion during his Ginther hearing testimony that the complainant's

prior claim that she was forced into involvement in white supremacist activities could be impeached with her involvement in prisoner/women's

group activities lacks merit, because extrinsic impeaching evidence could not be admitted on a collateral matter. See Mich. Rules Evidence 608(b).

The only claim of relevance that is not undermined by the established facts is counsel's claim that something might "come out" and taint a juror

for whom such information would be critically prejudicial. This is not a rational strategic purpose in light of the likely prejudice engendered by

disclosing the information to the entire jury. The likelihood of prejudice was much greater than the likelihood that a well-cautioned witness would

disclose such information "accidentally" and thus taint the jury. This was a serious error.

Setting up this testimony was the testimony of Ms. W-------- herself, in which she detailed Petitioner's involvement in the movement (T I 219-

225). Again, none of this testimony was necessary for the jury to determine the veracity of the allegations in this case. Its only effect was to prejudice

the jury and to encourage a verdict based on Petitioner's character.

The most egregious reference to Petitioner's membership in the organization came from Detective White-Erickson. She was clearly led by the

prosecutor to testify that she was familiar with Petitioner because she had investigated him as part of an FBI investigation into the entire movement

following the murder of a Judge's family in Chicago (T II 105-06):

Q: What was – did you have knowledge of the Defendant prior to this incident?

A: I had knowledge of him. Correct.

Q: Before this incident involving Angela Wiertalla arose, where you personally aware of any investigation regarding the Defendant?

A: I was asked by the FBI to assist them in an investigation.

Q: What was the nature of that investigation?

A: That investigation had to do with the creativity movement.

Q: And do you know what the status of that was at the time or where that is now?

A: At the time that the FBI asked me to assist them, which is to gather some information concerning the Defendant, and that was the time that the Judge's family in Chicago had been murdered. And so they were sort of checking out all of the people that were directly associated with the creativity movement (T II 105-106).

As clearly indicated above, the prosecutor asked the Michigan State Police detective whether she was aware of an investigation, what the nature

of the investigation was, and the current status of the investigation "at the time or where that is now." Clearly the prosecutor was seeking the answer

he got regarding the murder of a Federal

Judge's family in Chicago. The conclusion of the Michigan Court of Appeals on direct review that "[n]othing in the prosecutor's questions indicates

that the prosecutor was attempting to elicit improper evidence" and that "the lack of admissibility [of evidence that Petitioner was being investigated

for the murder of a Judge's family in Chicago] cannot be ascribed to any conduct by the prosecutor" must be seen as an unreasonable determination

of fact under 28 U.S.C. § 2254(d)(2).

There was no reason that the jury needed to know whether or not the detective had previous contact with Petitioner. There was certainly no

reason for them to know that he had been investigated as part of a movement that was involved with the murder of a judge's family. There was

nothing about the murder and the CSC crimes in this case that would justify admission as a prior act under Mich. Rules Evidence 404(b), and there

was no testimony that Petitioner was involved in any way in the murder. In fact, as noted in Issue I, supra, it was abundantly clear at the time of trial

that neither Petitioner, his group, or any white supremacist group had anything to do with the murder of a Federal Judge's family in Chicago. The

failure of the prosecutor to correct this extremely prejudicial inference was severe misconduct standing alone.

Disclosing Petitioner's possible involvement in such an offensive crime (the killing of a Judge's family) was likely to have a significant impact on

jurors' views of his likely involvement in the offensive crimes charged here. This information could easily have persuaded jurors to disregard any

reasonable doubts in deciding Petitioner's guilt (so that it could protect persons from the dangerousness exhibited in the murder of the Judge's

family).

It is undeniable that the introduction of this inflammatory evidence had an effect on the jury's verdict. The evidence was extremely

inflammatory. No significant inference can be drawn from the jury's verdict, convicting Petitioner on nine counts but acquitting him on three others,

except that it must not have found the evidence overwhelming. This is certainly the type of case (relying almost exclusively on the credibility

assessments of the accuser and of Petitioner) in which prejudice against a defendant based on an assessment of his character might play a key role.

By repeatedly telling the jury that the Petitioner was a member of a white supremacist organization, and by suggesting, falsely, that he was

involved in the murder of a Federal Judge's family in Chicago, the prosecution was able to successfully portray Petitioner as a danger to society; this

was highly prejudicial. The impact of the irrelevant testimony presented here must be considered overwhelming in this one-on-one credibility

contest. And even though the prosecutor did not highlight this testimony in closing argument, its repeated admission before the jury was sufficient

to assassinate Petitioner's character in this case and to "so [infect] the trial with unfairness as to make the resulting conviction a denial of due

process." The writ should be granted.

RELIEF REQUESTED

WHEREFORE, Petitioner Joel Nathan Dufresne requests that Respondent be required to appear and answer the allegations of this Petition, that

after full consideration, this Court relieve Petitioner Dufresne of the unconstitutional restraint on his liberty, and that this Court grant such other,

further and different relief as the Court may deem just and proper under the circumstances, as well as grant oral argument and an evidentiary

hearing (see Issues I and II) in this matter.

Respectfully submitted,

BY: s/ F. MARTIN TIEBER (P25485)

Tieber Law Office

Dated: November 2, 2012

2. REPLY to RESPONDENT's ANSWER to PETITION for WRIT of HABEAS CORPUS (6-13-13)

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

JOEL NATHAN DUFRESNE,

Petitioner,

-v.- Civil Action No. 1:12-cv-1210

HON. ROBERT HOLMES BELL

CARMEN PALMER, Warden, MAG. JOSEPH G. SCOVILLE

Respondent.

_____/

F. MARTIN TIEBER (P25485)

Attorney for Petitioner

_____/

REPLY TO RESPONDENT'S ANSWER TO PETITION FOR WRIT OF

HABEAS CORPUS

Petitioner Joel Nathan Dufresne now replies to the Respondent's Answer to his Petition for Writ of Habeas Corpus, filed on May 13, 2013.

Throughout its answer the Respondent, primarily through boilerplate, attempts to convince this Court that it no longer has power to provide habeas relief for state court petitioners no matter how egregious the federal constitutional violations, and that it cannot consider additional matters at an evidentiary hearing. The Respondent is clearly wrong on both counts.

Respondent also attempts to color this Court's attitude with irrelevant character assassination, painting a vivid, if misleading, portrait of Petitioner and his positions in this litigation.

The issue in this case was not whether Petitioner assaulted the Complainant during an incident in Cadillac, Michigan, acts which Petitioner never denied and which were never charged, but whether Petitioner forced sexual acts against Complainant's will. Petitioner has consistently maintained that the Complainant engaged willingly in sexual acts which some might consider abnormal, or that the acts she complained of never occurred. On this, the only critical point in this litigation, there was no evidence other than the statements of the Complainant and Petitioner, a classic "he said, she said" case.1 And due to the actions of the state trial judge and the inaction of trial defense counsel, Petitioner was stripped of his ability to test the Complainant's version of events at trial in violation of clear pronouncements of the United States Supreme Court regarding rights of criminal defendants under the federal constitution.

_____

1 The Respondent, at pp. 10 and 11 of its Answer, lays out "facts" as depicted by the Michigan trial and appellate courts. These statements simply recount the largely untested claims of the Complainant in this case.

_____

The failure to impeach the Complainant with substantial and multiple inconsistencies between her statements to police, her testimony at preliminary

examination, and her trial testimony on critical points alone establishes ineffective assistance of counsel under the Strickland standard, and any contrary determination by the state courts on this point satisfies the AEDPA standard, warranting habeas relief. This area is covered in detail at pp. 25-34 of Petitioner's original briefing in this Court.

The Respondent claims, as to this egregious constitutional violation, that the argument is procedurally defaulted. However, as Petitioner has already shown, any default with respect to failure to raise this matter on direct appeal has been extinguished by cause (ineffective assistance of direct appeal counsel, independently raised on state postconviction review) and prejudice. Respondent, at p. 27 of its answer, claims there is no cause here for reasons stated in Issue III, but then in Issue III refers back to Issue I. In other words Respondent's reasoning on this claim is circular. The suggestion, at pp. 33-35 of Respondent's Answer, that maybe trial defense counsel actually reviewed the Complainant's prior statements and decided to test her claims in other ways is simply nonsense because impeachment with critical, multiple inconsistencies is undoubtedly a level above attempts to impugn a witness's motivation. This is because factual inconsistencies can be clearly demonstrated in a way that suggestions of improper motivation cannot. See the cases cited by Petitioner on this point at pp. 29-31 of his original briefing in this Court.

So while trial defense counsel was able to make suggestions to the jury about why the Complainant was making false claims of forced sexual activity in this case, his critical neglect prevented him from showing the jury the actual mechanics of a false story: repeated substantial inconsistencies in the several renditions of claimed events. Respondent should surely understand the importance of such an attack, as it is often they key weapon used to convict criminal defendants. It was clearly understood by the Michigan Supreme Court in the

Brown case, cited in Petitioner's original brief at p. 30. And, importantly, blunting Respondent's theory that this major neglect was perfectly okay because defense counsel strategically went after the Complainant in other ways, there was absolutely no downside to adding an attack on the major inconsistencies present here, as noted in the Harris case also cited by Petitioner at p. 30 of his original brief.

Contrary to Respondent's claims, the neglect by trial defense counsel on this score was substantial and clearly met the first prong test of Strickland. And prejudice was simply overwhelming considering the "he said, she said" posture of this case on the relevant contested point – whether Petitioner forced Complainant to engage in unusual sexual activity against her will. Petitioner clearly meets the AEDPA standard allowing the grant of the writ as the state courts' implied determination that there was no ineffective assistance on this point was an unreasonable application of the decision of the United States Supreme Court in Strickland.(2)

_____

(2)It should be noted that Respondent, at pp. 28-30, relies on a lengthy quotation from the state trial court's opinion on this point, but this opinion contains only one fleeting reference to "prior inconsistent statements," and the claim that it was strategic not to use these must fail for the reasons stated above.

_____

Again, the failure to uncover the multiple, critical inconsistencies in Complainant's rendition of claimed events here is sufficient in and of itself to meet the Strickland test, and clearly renders Petitioner's trial fundamentally unfair under the federal constitution. But trial defense counsel's neglect did not stop there. He failed to bring in a series of critical witnesses who would have been able to show the jury that Complainant's claims that she abhorred unusual sexual activity ring

hollow.

Respondent counters this claim of investigatory failure by suggesting that the testimony of the witnesses would not have been relevant and/or would have been barred by the rape shield statute or state evidence rules. Respondent is clearly wrong. As illustrated by the discussion of applicable case law in Petitioner's original briefing, at pp. 44-46, given the factual construct of this case and Complainant's claims that unusual or experimental sex was repugnant to her and thus would never have been consensual, Petitioner had a confrontation right that eclipsed state evidence rules, including the rape shield statute, to show that there was substantial evidence that the Complainant engaged a sex life that was unusual and experimental, and enjoyed it. Respondent makes no effort to counter this argument beyond conclusory claims that state evidence rules would bar all of this evidence. The relevance of this evidence is obvious given Complainant's claims at trial.

Respondent also engages the same tactic utilized at trial - portraying Petitioner as an abhorrent, assaultive individual who deserves to be convicted whether or not his trial was constitutionally infirm. In doing so the Respondent, at p. 59 of its Answer, critically misstated evidence of the uncharged Cadillac area assault by claiming that "police officers were dispatched to the couple's house" and when they arrived they found Petitioner standing over Complainant who had "a severe cut on her head and quite a bit of blood on her face and head." By making it appear as if this activity occurred at Petitioner and Complainant's home, Respondent obviously seeks to tie this assaultive activity to the sexual misconduct charges actually filed here when, in reality, a quick check of the August 16, 2006 trial transcript at pages 160-162, reveals that this activity relates to the uncharged assaultive conduct in the Cadillac area which Petitioner never denied.

Respondent also misleads when stating, at p. 69 of its answer, that Petitioner

"admitted to the acts charged." This is actually beyond misleading and is blatantly false. While Petitioner at times agreed that he responded to Complainant's violence with physical conduct of his own, and never denied that he assaulted the Complainant in the uncharged Cadillac area incident, he consistently denied that he ever forced Complainant to engage in sexual activity, which was the root of all of the charges in this case. Indeed, if trial defense counsel had done his job in relation to obtaining and assessing Petitioner's full statement to police at arrest (see Petitioner's original brief at p. 24) he could have let the jury know that Petitioner continually professed his innocence of forcing non-consensual sex with Complainant. And Petitioner continued to assert his innocence at trial. Respondent has the temerity to suggest, at p. 68, that linking Petitioner with a group that was involved in the murder of the family members of a federal judge in Illinois was "relevant." (3) Respondent fails to note the critical point here. The group that Petitioner was involved in was shown, prior to trial, to have had absolutely no involvement whatsoever in the Illinois murder of the family members of a federal judge. The constitutional infirmity of a trial where Petitioner was wrongfully painted as being involved with the murder of the family of a federal judge in another state after the inaction of trial defense counsel deprived him of the tools necessary to contest the actual specific charges against him, charges that were based solely on the word of the Complainant who had clear motive to make false claims, is obvious and the writ should be granted.

_____

(3)Respondent misstates the factual background on this point by suggesting that a federal judge had been murdered. It was actually family members of the judge who had been killed.

_____

Finally, on the issue of whether this Court is lacking in power to hold an

evidentiary hearing, a few points are in order. As noted in Petitioner's previous briefing, it was clearly an abuse of discretion on this record for the state trial court, the Michigan Court of Appeals, and the Michigan Supreme Court to refuse an evidentiary hearing on postconviction. Under Cullen v. Pinholster, 131 S.Ct. 1388; 179 L.Ed.2d 557 (2011), this Court should assess the reasonableness of the state court determinations on federal constitutional issues in light of what the state courts had in front of them when they made their rulings – including the material that Petitioner put before them by way of affidavits, offers of proof, and other material submitted in support of the request for an evidentiary hearing in state court on postconviction. This material, presented to the state courts on postconviction, is part of the state court record. See Hodges v. Colson, 711 F.3d 589, 612-613 (2011). This Court can accept the validity of this material in assessing whether Petitioner has met his burden under the AEDPA and can then, in its discretion, order a hearing to validate any facts essential to its ruling.

Conclusion

For the reasons stated here and in the previously filed petition and brief in support, Petitioner Joel Nathan Dufresne urges this Court to grant the writ.

Respectfully submitted,

s/ F. Martin Tieber

Tieber Law Office

215 S. Washington Square, Suite C

Lansing, Michigan 48933

marty@tieberlaw.com

Date: June 13, 2013

I hereby certify that on June 13, 2013, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

. Honorable Robert Holmes Bell

. Honorable Joseph G. Scoville

. Andrea M. Christensen, Attorney for Respondent

Christensena1@michigan.gov

s/ F. Martin Tieber

Tieber Law Off

215 S. Washington Square, Suite C

Lansing, MI 48933